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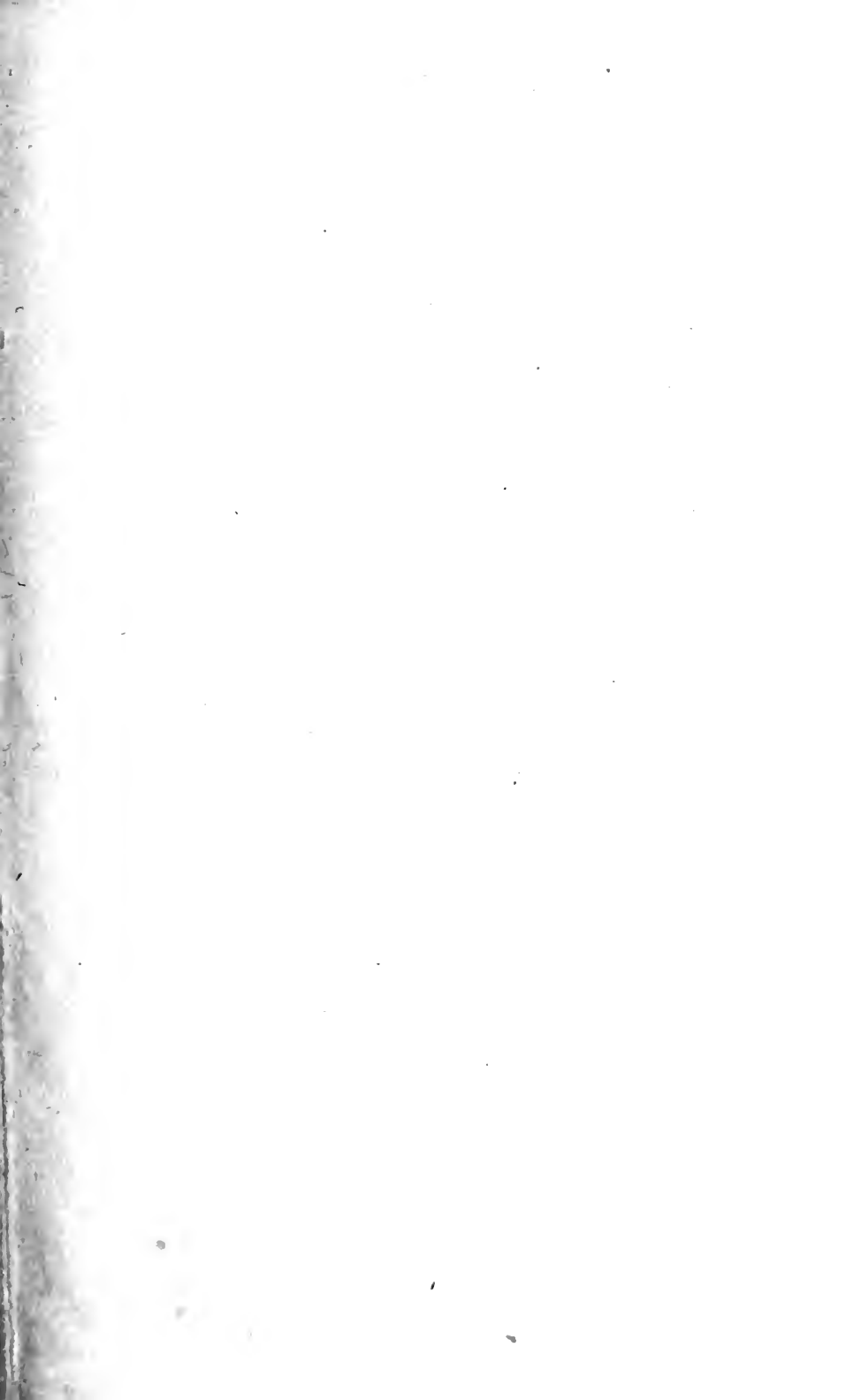
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No. 10378

United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol 2378
Exhibits in Custody of Clerk.

MONTGOMERY WARD AND COMPANY,
a corporation,

Appellant,

vs.

CHESTER A. LAMBERSON and LYDIA
LAMBERSON,

Appellees.

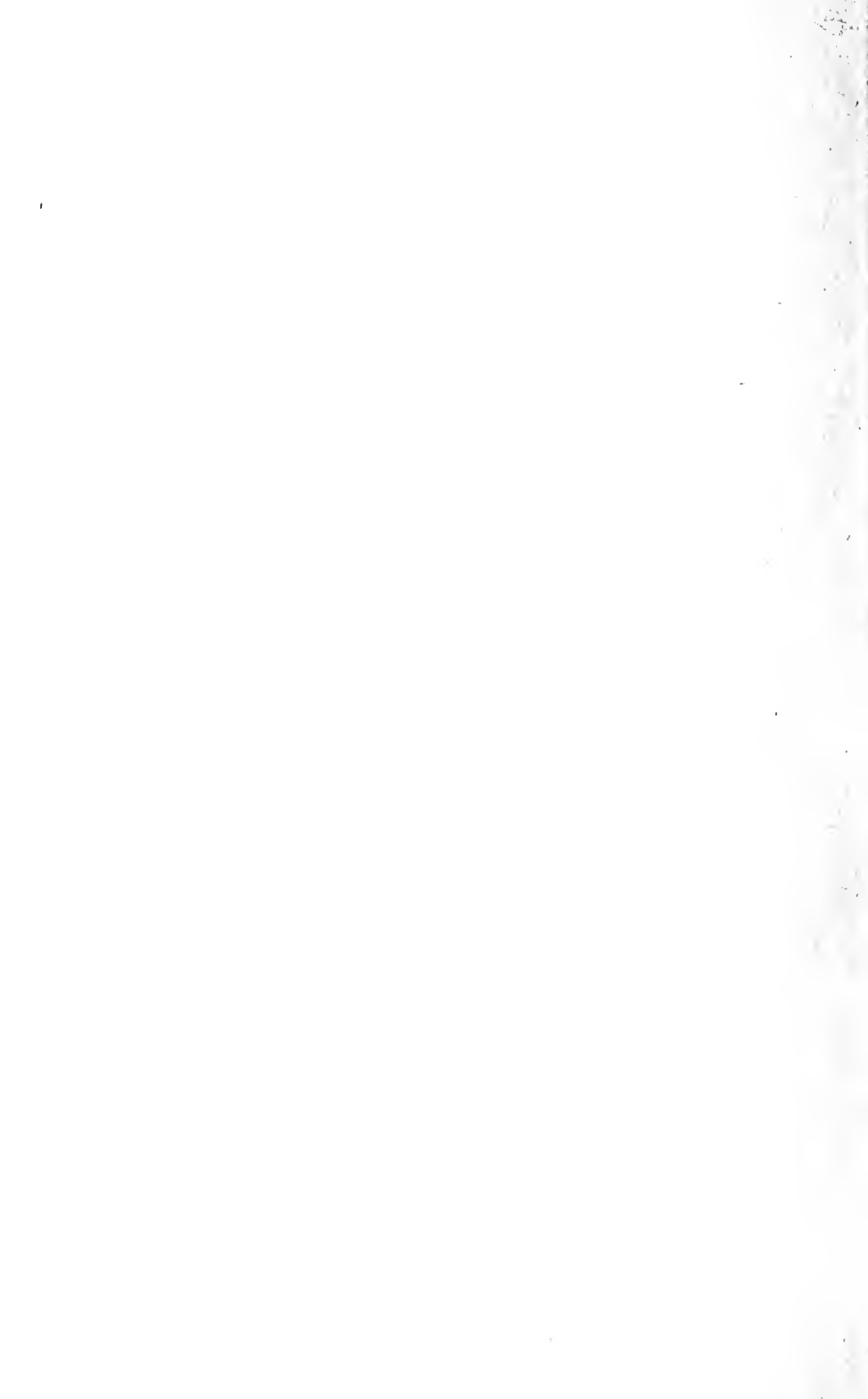
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division

FILED

MAR 30 1943

PAUL F. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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CLYDE BOWEN

W. H. ANDERSON

Pocatello, Idaho

WILLIAM S. HOLDEN

Idaho Falls, Idaho

Attorneys for Appellees. [2*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States,
In and for the District of Idaho,
Eastern Division

No. 1183

CHESTER A. LAMBERSON and LYDIA LAM-
BERSON,

Plaintiffs,

vs.

MONTGOMERY WARD and COMPANY, a cor-
poration,

Defendant.

COMPLAINT

Plaintiffs for cause of action against the defend-
ant, complain and allege:

I.

That at all the times hereinafter mentioned the plaintiffs were, and still are, husband and wife and are citizens and residents of the District and State of Idaho.

II.

That at all the times hereinafter mentioned the defendant was and still is a corporation duly organized and existing under the laws of the State of Illinois, and is authorized to transact and carry on business in the State of Idaho, by having complied with the laws of the State of Idaho with respect to foreign corporations doing business therein.

III.

That the defendant is a citizen and resident of the State of Illinois and the jurisdiction of this Court depends upon diversity of citizenship of the parties plaintiff and defendant. That the plaintiffs are citizens and residents of the State of Idaho, while the defendant is a citizen and resident of the State of Illinois.

IV.

That the matter in dispute herein is in excess of Three Thousand (\$3000.00) Dollars, exclusive of interest and costs, to-wit, the sum of Twenty-five Thousand One Hundred Ninety-five (\$25,195.00) Dollars.

V.

That the defendant maintains many stores and mercan- [3] tile establishments throughout the United States and in the State of Idaho, and among others maintains one such establishment on Shoup Avenue in the City of Idaho Falls, Idaho; said store on Shoup Avenue in said City of Idaho Falls, faces the west.

VI.

That the defendant invites the public generally to visit and enter said stores and trade therein and buy merchandise from the defendant in its said establishments, stores or branches of business and the defendant invited the public to enter and trade at its store on Shoup Avenue in the City of Idaho Falls, Idaho, and did invite this plaintiff, Lydia Lamberson, to enter therein as a customer to buy

merchandise of and from the defendant and to trade with said defendant.

VII.

That on the 26th day of November, 1941, at Three Thirty o'clock in the afternoon of said day, the plaintiff, Lydia Lamberson, entered the place of business of the defendant on Shoup Avenue in the City of Idaho Falls, Idaho, for the purpose of purchasing merchandise.

VIII.

That defendant's said store on Shoup Avenue in Idaho Falls, Idaho, had four doors all of which face the west on Shoup Avenue, and the plaintiff, Lydia Lamberson, entered said store through the third door from the south.

IX.

That after being in said store for sometime shopping, the plaintiff, Lydia Lamberson, attempted to leave and depart through the same door which she entered; said third door from the south and the one through which plaintiff, Lydia Lamberson, entered and departed, sloped up to the east from the sidewalk for a distance of approximately seven feet and the floor of the entrance to said door is hard tile and becomes very slick and slippery when wet, which is under the exclusive control of defendant. [4]

X.

That at the time the plaintiff, Lydia Lamberson, entered said store of the defendant, through said

third door from the south, said entrance from the sidewalk to the door, and the tile part hereinbefore mentioned, was dry and was not slippery. That during the time that the said plaintiff, Lydia Lamberson, was in said store of the defendant, said defendant, through and by its agents, servants and employees, acting in the line, course and scope of their employment, cast or threw considerable water upon said tile between the sidewalk and the said store door and wet the same and that by reason thereof the same was extremely slick and slippery; whereupon, the plaintiff, Lydia Lamberson, attempted to depart through said third door from the south and upon approaching said sloping tile, by reason of the same being wet the plaintiff's, Lydia Lamberson's, feet slipped out from under her and she fell with great force and violence and did then and there break her wrist and that by reason of said break, said wrist is deformed and that she is permanently injured.

XI.

That she was otherwise injured, damaged and bruised and rendered sick, sore and lame and was unable to sleep at night and has suffered great and extreme pain and anguish ever since receiving said injury, still suffers therefrom and will continue to suffer therefrom so long as she may live.

XII.

That the defendant was negligent, careless and heedless in the following particulars, to-wit: In maintaining, allowing and permitting said tile be-

tween said door and sidewalk to be in a wet, slippery, slick and dangerous condition, well knowing that customers were required to and did pass over the same and particularly knowing that the plaintiff, Lydia Lamberson, would pass over the same in leaving said store and were negligent, careless and heedless in that the defendant, through and by its agents, servants and employees, cast and threw large quantities of water on said tile and allowing same to remain there and rendering the same [5] a trap or snare, dangerous to anyone attempting to enter or depart from said store.

XIII.

That the defendant was negligent, careless and heedless through and by its agents, servants or employees in not showing the plaintiff, Lydia Lamberson, of the dangerous condition of said tile, to the end that the plaintiff, Lydia Lamberson, could have taken precaution thus avoiding said injury or used another door and under a safer condition.

XIV.

That the defendant, through and by its agents, servants and employees were negligent, careless and heedless, in not throwing ashes, or sand, or some other substance upon said *tile* to render the same safe for persons to pass thereover, and particularly with respect to the plaintiff, Lydia Lamberson.

XV.

That the defendant was negligent in not *mopping*

the water from said tile and thereby leaving said snare or trap for the defendant's customers to pass thereover.

XVI.

That the plaintiffs, in an effort to effect a cure for the extreme, excruciating and painful injuries of Lydia Lamberson, sustained as aforesaid, were forced and did employ a physician and surgeon and did incur liability for treatment to said injuries in the sum of Forty-five (\$45.00) Dollars, and that said sum of Forty-five (\$45.00) Dollars is reasonable for the services rendered by said physician and surgeon.

XVII.

That the plaintiff, Lydia Lamberson, was regularly employed at the time of receiving said injuries as a cosmetic saleswoman and was earning a good commission, or income, of, to-wit, Sixty (\$60.00) Dollars per month and that by reason of said injury, the plaintiff, Lydia Lamberson, was unable to follow her employment for a period of three months and lost by reason of said injury the sum of One Hundred Fifty (\$150.00) Dollars in earnings. [6]

XVIII.

That all of the damages and injuries sustained, as aforesaid, by the plaintiffs was proximately caused by the negligence, carelessness and heedlessness of the defendant, its agents, servants and employees while acting in the line, course and scope of their employment, as herein set forth.

XVIX.

That by reason of the premises, the plaintiffs suffered general damages in the sum of \$25,000.00, and special damages as herein set forth in the sum of \$195.00.

Wherefore, plaintiffs pray judgment against the defendant for the sum of \$25,000.00 general damages, and \$195.00 special damages, for costs of suit and general relief.

CLYDE BOWEN

WALTER H. ANDERSON

Attorneys for Plaintiffs

Residence and P. O. Address

Pocatello, Idaho

WILLIAM S. HOLDEN

Attorney for Plaintiffs

Residence and P. O. Address

Idaho Falls, Idaho

State of Idaho

County of Bonneville—ss.

Lydia Lamberson, being first duly sworn, deposes and says: That she is one of the plaintiffs in the above and foregoing Complaint and she knows the allegations therein contained and the same are true as she verily believes and that she makes this verification on behalf of herself and co-plaintiff husband, Chester A. Lamberson.

LYDIA LAMBERSON

Subscribed and sworn to before me this 2nd day of June, A. D. 1942.

[Seal]

WILLIAM S. HOLDEN

Notary Public

For the State of Idaho

Residing at Idaho Falls, Idaho

My commission expires June 6, 1945.

[Endorsed]: Filed June 4, 1942. [7]

[Title of Court and Cause.]

MOTIONS AND NOTICE

Comes now the defendant, Montgomery Ward and Company, a corporation, and moves the court as follows:

First: To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

Second: Defendant moves the court for an order requiring plaintiffs to make a more definite statement of their alleged cause of action for the following reasons: That said complaint is uncertain and indefinite in the following particulars:

(a) That it cannot be determined therefrom whether the slope of the tile entryway from the sidewalk to the door described in said complaint, contributed to the alleged fall of the plaintiff, Lydia Lamberson, or whether the alleged fall of the said plaintiff was caused only by the alleged presence of water on said tiling.

(b) That, whereas, the complaint alleges spe-

cifically that said plaintiff “fell with great force and violence and did then and there break her wrist”, said allegation is indefinite and uncertain in that it cannot be determined therefrom which wrist was broken and it cannot be determined what kind of fracture, if any, was sustained by said plaintiff. Neither can it be determined from the said complaint which bone or bones of the arm involved were broken and the kind or classification of the fracture alleged to have occurred.

(c) That it cannot be determined from the said complaint whether said plaintiff was a right handed or left handed person.

(d) That, whereas, the complaint alleges in paragraph XI thereof “that she was otherwise injured, damaged and bruised and rendered sick, sore and lame”, it cannot be determined where on her body or how she was injured otherwise than by the alleged fracture of the said wrist.

(e) That it cannot be determined from the said complaint whether “the wrist” described in the complaint refers to a certain [8] bone or bones in either one of the arms.

(f) That it cannot be determined from said pleading whether the reduction of the alleged fracture of some bone or bones unnamed was successful from a medical or surgical standpoint.

Third: The defendant further moves the court to make and enter an order herein requiring the plaintiffs to prepare and furnish to defendant a Bill of Particulars covering the matters and things hereinafter specified so as to enable the defendant

properly to prepare its answer and to prepare for trial, to wit:

(a) Showing whether plaintiff, Lydia Lamberson, was a right handed or left handed person at the date of the alleged accident.

(b) Whether the metacarpus or carpus or other bone or bones were fractured and the specific kind of fracture alleged to have been sustained.

(c) Which arm, right or left, was involved in the alleged fracture.

(d) The age of the plaintiff, Lydia Lamberson.

Fourth: The defendant further moves the court to make and enter an order herein directing the said plaintiff, Lydia Lamberson, to present herself to Dr. C. M. Cline, First Security Bank Building, corner of Park Avenue and A Street, on the second floor thereof, in Idaho Falls, Bonneville County, State of Idaho, the place of the residence of the said plaintiffs, for the purpose of submitting to a physical examination by the said Dr. C. M. Cline as the representative of the defendant; and that said order provide that said physical examination be made by said Dr. C. M. Cline, on, to wit, Wednesday, July 1st, 1942, at the hour of 3 o'clock P. M. of said day at said office, or such other time and place as to the court may seem meet and proper and as may be convenient to the said plaintiff.

OTTO E. McCUTCHEON

Attorney for the Defendant.

Residence and P. O. Address:

208 Salisbury Building, Idaho Falls, Idaho.

NOTICE OF MOTION

To Messrs. William S. Holden, American National Bank Building, Idaho Falls, Idaho, Clyde Bowen, First Security Bank Building, Pocatello, Idaho, Walter H. Anderson, 209 Pioneer Building, Pocatello, Idaho, attorneys for the plaintiffs, and to Chester A. Lamberson and Lydia Lamberson, of Idaho Falls, Idaho, plaintiffs:

You and each of you will please take notice that the undersigned will bring the above motions on for hearing before this court in the Federal Building at Pocatello, Idaho, on the first day of the next term of said court in said district and division, to wit, on the 12th day of October, 1942, at the hour of 11 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard; or at such other time or place as the counsel and court find convenient and as may be ordered by the court.

OTTO E. McCUTCHEON

Attorney for the Defendant.

Residence and P. O. Address:

208 Salisbury Building,

Idaho Falls, Idaho.

(Service Accepted.)

[Endorsed]: Filed June 15, 1942. [10]

[Title of Court and Cause.]

NOTICE

The defendant, Montgomery Ward and Company, a corporation, and its counsel, Otto E. McCutcheon, Esq., will please take notice that the motions heretofore served in this action will be called upon brief at Boise, Idaho pursuant to rule No. 18 of the Rules of Practice of the United States District Court for the District of Idaho, adopted September 19, 1938.

You will please govern yourselves accordingly.

Dated at Pocatello, Idaho, this 13th day of June, A. D. 1942.

CLYDE BOWEN

Pocatello, Idaho

WALTER H. ANDERSON

Pocatello, Idaho

WILLIAM S. HOLDEN

Idaho Falls, Idaho

(Service Accepted.)

[Endorsed]: Filed June 22, 1942. [11]

[Title of Court and Cause.]

ORDER RULING ON MOTIONS

The defendant has presented four different motions for consideration effecting the alleged cause of action of the plaintiffs:

First; its motion to dismiss appears to have been withdrawn by the defendant from further consideration.

Second; its motion requiring the plaintiffs to make a more definite statement in their complaint, and

Third; the request to furnish bill of particulars may be considered together, and it is sufficient to say that the motion to make a more definite statement in the complaint relating to the request therein specified should be denied, excepting that the request in (c) as to which arm, the right or left, "was involved in said fracture" and what other part of the body of the plaintiff was injured, if any, should be granted under the motion for bill of particulars.

Fourth; it appears from the brief of the plaintiff filed on the motion, that the plaintiff has consented to submit herself to a physical examination by a licensed physician, and therefore it will be unnecessary to rule thereof, and It Is So Ordered,

Dated July 7, 1942.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed July 7, 1942. [12]

[Title of Court and Cause.]

BILL OF PARTICULARS

To the Defendant and its Counsel, Otto E. McCutcheon, Esq.:

You are hereby notified that agreeably to the order of the Court heretofore made and entered on

the 7th day of July, 1942, the plaintiffs furnish you with the following bill of particulars:

That the plaintiff Lydia Lamberson's injuries caused by the fall mentioned in the plaintiff's complaint were as follows:

Her right wrist was broken; her back was sprained and injured which causes her severe pain from time to time yet and has ever since receiving said injury; that she injured her right ankle by spraining and bruising the same and said ankle is still discolored and pains her quite often up to this time.

Dated this 16th day of July, 1942.

WILLIAM S. HOLDEN

Res. Idaho Falls, Idaho

CLYDE BOWEN

Res. Pocatello, Idaho

WM. H. WITTY

Res. Pocatello, Idaho

WALTER H. ANDERSON

Res. Pocatello, Idaho

(Service Accepted.)

[Endorsed]: Filed July 20, 1942. [13]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME
TO ANSWER

It is hereby stipulated and agreed by and between the respective parties through their respective at-

torneys of record that the defendant may have to and including the 12th day of August, 1942, to file and serve its answer in the above entitled action.

Dated July 22nd, 1942.

WILLIAM S. HOLDEN

Attorneys for the Plaintiffs.

OTTO E. McCUTCHEON

Attorney for the Defendant.

[Endorsed]: Filed July 23, 1942. [14]

[Title of Court and Cause.]

ANSWER

Comes now the defendant, Montgomery Ward and Company, a corporation, and for its answer to the complaint of the plaintiffs on file in said Court and said cause, admits, denies and alleges as follows:

FIRST DEFENSE

Admits the allegation set forth in Paragraphs numbered I, II, III, V, VI, VII and VIII of the said complaint, but, nevertheless, alleges that the said complaint fails to state a claim against the defendant upon which any relief can be granted.

SECOND DEFENSE

As to paragraphs numbered IV, IX, X, XI, XII, XIII, XV, XVI, XVII, XVIII and XIX of the said complaint the defendant denies generally and specifically each and all of the allegations set forth

in each and all of the said numbered paragraphs except those allegations thereof which are hereinafter specifically admitted or admitted by a statement of fact.

THIRD DEFENSE

As a third separate and distinct defense defendant alleges: That the tile floor in the entrances to said store, including the one alleged to have been used by the plaintiff, Lydia Lamberson, on entering and leaving said store, was at said time and place constructed of small blocks of encaustic tile the exposed faces or surfaces of which were and are approximately one inch square, set together and bound by cement, and that said floor or space was and is rough or roughened so as to prevent the same from becoming slick or slippery whether the same be wet or dry; that the slope of said floor or surface from the threshold of the door was and is approximately one inch in seven feet or, one seventh of one inch per foot of distance from the said door to the edge of the public sidewalk then and there existing on the easterly side of said Shoup Avenue which was and is the westerly front of said building; that defendant was not and is [15] not the owner of said property but rented and rents it from one B. M. Rogers of Idaho Falls, Idaho, the owner thereof.

That the said tile was dry at the time said plaintiff entered the store and remained dry until after she had left the building, and said tile was in such

condition at the time said plaintiff left the store that it was impossible for her to have slipped thereon; that at said time and place said entryway presented a safe and secure path and footing for the use of said plaintiff and defendant's customers using said entryway for ingress and egress to and from said store; that no act or omission of defendant or any of its employees or agents made, or in any way contributed to making, said entryway unsafe for said plaintiff or any other customer.

FOURTH DEFENSE

As a fourth, separate and distinct defense, the defendant alleges:

1

That whatever damages, if any, sustained by the plaintiffs and particularly the plaintiff, Lydia Lamberson, were directly contributed to and proximately caused by the negligence, carelessness, and heedlessness of the said Lydia Lamberson in failing to observe and heed where she was walking and the conditions prevailing and observable in her path from the store to the sidewalk and under foot.

FIFTH DEFENSE

1

As a fifth, separate and distinct defense thereto, the defendant alleges:

That it is informed and believes and on such information and belief it alleges that the plaintiff, Lydia Lamberson, did not slip on said tile, floor or

walk in said entrance to defendant's store, either as alleged or otherwise or at all; the defendant alleges that the fall, if any, sustained by the said plaintiff on her leaving said building, was proximately caused by an arthritic condition of her ankles and knees existing at that time and previously; and that due to said arthritic condition she, the said Lydia Lamberson, suffered and sustained a turning or giving away of her ankle or ankles whereupon she dropped to the floor or tile; that said plaintiff's arthritic condition had frequently caused her to fall previously to on or about November 26th, 1941, at various and sundry times and places; and on said 26th day of November, 1941, plaintiffs well knew of the said arthritic condition and the tendency of her ankles to turn causing her to fall, but, nevertheless, she heedlessly, carelessly and negligently, at said time and place did nothing to support herself by the use of any appropriate aid required by her on account of said arthritic condition of the joints of her legs.

Wherefore, having fully answered, defendant prays that the plaintiffs either jointly or severally take nothing by their said complaint and that judgment of dismissal be made and entered herein, and for costs of suit and general relief.

OTTO E. McCUTCHEON

Attorney for Defendant.

Residence and P. O. Address:
Idaho Falls, Idaho.

(Duly verified.)

To the Honorable Court, the attorneys for the plaintiffs, and the plaintiffs:

Please take notice that defendant demands trial of said cause before the court sitting without a jury.

OTTO E. McCUTCHEON

Attorney for Defendant.

Residence and P. O. Address:

Idaho Falls, Idaho.

(Service accepted.)

[Endorsed]: Filed August 11, 1942. [17]

[Title of Court and Cause.]

OPINION

William S. Holden,

Idaho Falls, Idaho.

Walter H. Anderson,

Pocatello, Idaho.

Clyde Bowen,

Pocatello, Idaho.

Attorneys for the Plaintiffs.

Otto E. McCutcheon,

Idaho Falls, Idaho.

Attorney for the Defendant.

October 20, 1942.

Healy, Circuit Judge (Presiding)

It was shown by a preponderance of the testimony that at the time of the accident there was water on the ramp leading from defendant's store, and

that the presence of the water was the proximate cause of Mrs. Lamberson's slipping and falling. It is not disputed that as a result of the fall both bones of her right forearm were fractured close to the wrist. There is no sufficient evidence of contributory negligence.

Judgment will therefore be for the plaintiffs. The injury has resulted in some permanent disability. General damages are assessed in the sum of Seventeen hundred fifty dollars and special damages in the sum of \$195.00.

Counsel for plaintiffs will prepare and submit findings, conclusions of law and judgment.

WILLIAM HEALY

Circuit Judge, acting as

District Judge.

[Endorsed]: Filed October 20, 1942. [18]

[Title of Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above case came on regularly for trial before the court without the intervention of a jury. And the court having reached its decision announces its findings of fact and conclusions of law as follows:

I.

That the plaintiffs were at all times herein mentioned and still are husband and wife and citizens and residents of the State and District of Idaho.

II.

That the defendant was at all times herein mentioned and still is a corporation duly organized and existing under the laws of the State of Illinois, and is duly authorized to do and transact business in the State of Idaho.

III.

That the necessary diversity of citizenship exists herein to give this court jurisdiction, in that the plaintiffs are citizens and residents of the State of Idaho, and the defendant is a citizen and resident of the State of Illinois. And the amount in controversy at the time the action was filed was sufficient to give this court jurisdiction.

IV.

That the defendant maintains stores at various cities and *town* throughout the United States, and one of which defendant's stores is located at Idaho Falls, Bonneville County, Idaho.

V.

That the defendant in the maintenance of such stores invites the public to enter and patronize the same.

VI.

That on the 26th day of November in 1941, the plaintiff, Lydia Lamberson, entered the place of business or the store of the defendant located in Idaho Falls, Idaho, and at the time of her entrance into said store the ramp or entranceway leading from [19] the sidewalk to the door and into defendant's store was at said time and place dry.

VII.

That the plaintiff, Lydia Lamberson, after entering said store and shopping around for some time attempted to leave or depart from said store, and in so doing traveled over the same ramp or entrance-way whereby she had theretofore entered, and at the time of her departure or leaving, the said ramp or entrance-way had water on it, and defendant was negligent in allowing said water to be upon and remain on said ramp or entrance-way without any sand, or ashes, or some matting to cover the same.

That the ramp or entrance-way into the store wherein the plaintiff, Lydia Lamberson, entered at the time of her entrance therein and at the time of her departure therefrom and at the time of her injury was under the exclusive control of the defendant herein.

XIII

That when the plaintiff, Lydia Lamberson, attempted to leave the store and pass over said ramp or entrance-way, as a proximate cause of the same being wet, it was due to defendant's negligence, and the absence of any ashes or sand or matting on said ramp or entrance-way, she slipped and fell onto the ramp or entrance-way, and as a result of said fall, broke both bones in her right forearm near the wrist, and by reason thereof she sustained some permanent disability.

IX.

That the plaintiff, Lydia Lamberson, was not contributorily negligent in passing out and over

said ramp or entrance-way, at the time and place of receiving said injury.

X.

That the defendant did not give the plaintiff, Lydia Lamberson, any warning or notice of water being upon said ramp or entrance-way, neither prior to nor at the time of her passing out and over said ramp or entrance-way. [20]

XI.

That at the time the plaintiff, Lydia Lamberson, was passing out and over said ramp or entrance-way there were no ashes, sand or matting or any other substance thereon to render the same safe for patrons and persons using said ramp or entrance way to pass safely over the same, and particularly the plaintiff, Lydia Lamberson.

XII.

That the plaintiffs have suffered general damages in the sum of \$1750.00 and special damages in the sum of \$195.00.

CONCLUSIONS OF LAW

That the defendant, Montgomery Ward and Company, a corporation, was negligent at said time and place in maintaining and permitting and allowing said ramp or entrance-way to have water on it.

That the defendant, Montgomery Ward and Company, a corporation, was, as a matter of law, negligent at said time and place in failing to notify said plaintiff, Lydia Lamberson, of the existence of wa-

ter upon said ramp or entrance-way, and said defendant was further negligent in not having salt or sand or ashes or matting upon said ramp or entrance-way at said time and place.

That the plaintiff, Lydia Lamberson, was not contributorily negligent as a matter of law in passing out and over said ramp or entrance-way at the time and place of receiving her injuries as aforesaid.

That as a conclusion of law plaintiffs have sustained general damages in the sum of \$1750.00 and special damages in the sum of \$195.00, lawful money of the United States of America.

Let judgment be entered for said sums in favor of the plaintiffs, Chester A. Lamberson and Lydia Lamberson, and against the defendant, Montgomery Ward and Company, a corporation, together with costs of said suit.

Done at Pocatello, Bannock County, Idaho, in open court on this 28 day of October, A. D., 1942.

WILLIAM HEALY

Circuit Judge acting as

District Judge.

(Service Accepted.)

[Endorsed]: Filed October 28, 1942. [21]

[Title of Court and Cause.]

NOTICE OF APPLICATION TO HAVE COSTS
AND DISBURSEMENTS TAXED

To the above named defendant, Montgomery Ward
& Company, a corporation, and to its attorney,
Otto E. McCutcheon:

You, and each of you, will please take notice, that
on the 28th day of October, A. D., 1942, at ten
o'clock A. M., in the Clerk's Office of the United
States District Court, at Pocatello, Idaho, the plain-
tiff will make application to the Clerk of said Court
to have costs and disbursements taxed in the above
entitled case as set out and specified in the Memo-
randum of Costs and Disbursements hereunto at-
tached, hereby referred to and made a part of this
notice.

Dated this 21st day of October, A. D., 1942.

WILLIAM S. HOLDEN

Res. and P. O. Address,
Idaho Falls, Idaho

WALTER H. ANDERSON

Res. and P. O. Address,
Pocatello, Idaho

CLYDE BOWEN

Res. and P. O. Address,
Pocatello, Idaho

Attorneys for Plaintiff.

(Service Accepted.)

[Endorsed]: Filed October 24, 1942. [22]

[Title of Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

June, 1942—Clerk's fee	\$ 10.00
Oct. 15, 1942—Shorthand Reporter's Fee, 1 day @ \$10.00 per diem, one-half of which was paid by plaintiff and defendant respectively by agreement.....	5.00

Total—Exclusive of witness' fees.....	\$ 15.00
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Witness Fees:

Mrs. Elaine Merrill, Residence Idaho
Falls, Idaho

Witness Fee, 1 day @ \$2.00.....\$ 2.00

Mileage from Idaho Falls to Poca-
tello, and return, 100 miles @ 5¢ 5.00

7.00

Mrs. A. C. Criddle, Residence Idaho
Falls, Idaho,

Witness Fee, 1 day @ \$2.00.....\$ 2.00

Mileage from Idaho Falls to Poca-
tello, and return, 100 miles @ 5¢ 5.00

7.00

Mrs. H. D. Thueson, Residence Idaho
Falls, Idaho,

Witness Fee, 1 day @ \$2.00.....\$ 2.00

Mileage from Idaho Falls to Poca-
tello, and return, 100 miles @ 5¢ 5.00

7.00

\$ 36.00

State of Idaho,

County of Bannock—ss.

Clyde Bowen, Being first duly sworn, on oath
deposes and says:

That he is one of the attorneys for the plaintiffs
in the above entitled cause; that he has examined
the above and foregoing Memorandum of Costs and

Disbursements; that he has knowledge of the facts to the effect that the items thereof are correct, that the disbursements therein set forth have been necessarily incurred in said action, and that the services charged therein have been actually and necessarily performed as therein stated.

CLYDE BOWEN.

Subscribed and Sworn to Before me this 21st day of October, A. D., 1942.

[Seal]

DOROTHY E. JOHN,

Notary Public.

Res.: Pocatello, Idaho.

[Endorsed]: Filed October 24, 1942. [23]

[Title of Court and Cause.]

NOTICE OF MOTION FOR STAY
OF PROCEEDINGS

To the plaintiffs, Chester A. Lamberson and Lydia Lamberson, and their counsel, William A. Holden, Walter H. Anderson, and Clyde Bowen; and to W. D. McReynolds, Clerk of said Court:

You and each of you will please take notice that defendant has filed in said Court and in said cause its motion for a stay of execution to give time to file motion and petition for a new trial of said cause, copy of which is hereto annexed, made a part hereof and hereby referred to for greater particularity. You will further take notice that said motion and application for stay of execution will

be presented to Hon. William Healy, Circuit Judge, acting as District Judge in said Court, on Wednesday, October 28th, 1942, at 9:30 in the forenoon of said day at the court room of said court in the Federal Building at Pocatello, Idaho, or at chambers, or as soon thereafter as counsel can be heard.

Dated October 27th, 1942,

OTTO E. McCUTCHEON,

Attorney for Defendant.

Residing at Idaho Falls,
Idaho.

[Endorsed]: Filed October 28, 1942. [24]

[Title of Court and Cause.]

MOTION FOR STAY OF EXECUTION TO
GIVE TIME TO FILE MOTION FOR NEW
TRIAL:

To the Honorable District Court of the United States
for the District of Idaho, Eastern Division:

Now comes Montgomery Ward & Company, a Corporation, the defendant in the above entitled cause, and moves this Court to stay execution upon the judgment entered herein in favor of Chester A. Lamberson and Lydia Lamberson, plaintiffs, against Montgomery Ward & Company, a Corporation, defendant, in the above cause on the 28th day of October, 1942, for forty two days from said date, to give time to said defendant to file in the Clerk's office in said Court a petition and motion

for a new trial, pursuant to Section 840 of Title 28 of the United States Code and Rule 50 of the rules of practice of the United States District Court for the District of Idaho, adopted September 19th, 1938, and now in full force and effect.

Dated October 27th, 1942.

OTTO E. McCUTCHEON,

Attorney for Defendant.

Residence and Post Office Address: Idaho Falls, Idaho.

[Endorsed]: Filed October 28, 1942. [25]

In the District Court of the United States in and for the District of Idaho, Eastern Division

No. 1183

CHESTER A. LAMBERSON and LYDIA LAMBERSON,

Plaintiffs,

vs.

MONTGOMERY WARD and COMPANY, a corporation,

Defendant.

JUDGMENT

This cause having been heard before the court without the intervention of a jury, and the court having heretofore made its findings of a fact and announced its conclusions of law and filed the same herein;

It is Therefore, Upon the Findings and Order of the Court, Ordered, Adjudged and Decreed that the plaintiffs, Chester A. Lamberson and Lydia Lamberson, do have and recover of and from the defendant, Montgomery Ward & Company, a corporation, the sum of \$1945.00, lawful money of the United States of America, and costs of this suit taxed at 36.00 Dollars.

That an execution is awarded for the collection of this judgment.

Witness the Hon. William Healy, Circuit Judge acting as District Judge of said Court, and the Seal thereof this 28th day of October, 1942.

[Seal] W. D. McREYNOLDS,

Clerk United States District
Court.

[Endorsed]: Filed October 28, 1942. [26].

[Title of Court and Cause.]

ORDER GRANTING STAY OF
EXECUTION:

This cause came on for further hearing on the 28th day of October, 1942, on the motion of Montgomery Ward & Company, a Corporation, defendant, in the above cause, for an order staying execution therein, to give time for filing a petition and motion for a new trial in this cause, and, after hearing counsel, it was

Ordered that the issuance of execution upon the

judgment in the above cause entered on the 28 day of October, 1942, be stayed until the 9th day of December, 1942, on condition that the defendant execute a surety bond or undertaking in accordance with Rule 61 of this Court adopted September 19th, 1938, in the amount of the judgment and costs. This order is made and entered to give defendant time to file a petition and motion for a new trial in said cause. Bond shall be furnished within 5 days.

Dated October 28, 1942.

WILLIAM HEALY,

Circuit Judge Acting as District Judge.

[Endorsed]: Filed October 28, 1942. [27]

[Title of Court and Cause.]

BOND STAYING EXECUTION

Whereas, a judgment was entered in the above entitled cause in said Court on the 28th day of October, 1942, in favor of the plaintiffs and against the defendant, Montgomery Ward & Company, a corporation, and thereafter and on said 28th day of October, 1942, said defendant moved the said Court to grant an order staying the issuance of an execution therein for the purpose of giving defendant time for filing a petition and motion for new trial in the said cause under the provisions of Title 28, Section 840, United States Code, and

thereafter on the same date an order was made and entered by said Court staying the issuance of execution until the 9th day of December, 1942, on condition that the defendant execute a surety bond or undertaking and file the same with the Clerk, within five days of the date of said order in an amount equal to the said judgment and costs, and,

Whereas, said judgment and costs amounted to the sum of \$1981.00.

Now, therefore, the undersigned, United States Fidelity and Guaranty Company, of Baltimore, Maryland, a surety company authorized to transact business within the State of Idaho, and authorized under the laws of the United States to become a surety in causes pending in the United States District Courts, does hereby acknowledge itself security for the defendant, Montgomery Ward & Company, a corporation, for the payment of that certain judgment rendered in said Court and said cause as aforesaid for the sum of \$1981.00, being the judgment and costs, for the purpose of a stay of execution on said judgment for the term ending on December 9th, 1942, and it does hereby bind itself to pay the said judgment with interest and accruing costs on said date, December 9th, 1942, if the said defendant does not, on or before said date, file its petition and motion for a new trial in the office of the Clerk of said Court, as permitted by the order hereinbefore referred to staying execution. [28]

In Witness Whereof, the said surety has executed this undertaking by its duly authorized agent and attorney in fact at Idaho Falls, Idaho, this 30th day of October, 1942, for the uses and purposes hereinbefore mentioned.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY OF BALTIMORE,
MARYLAND, a corporation,

[Seal] By F. O. SIMONSON,
Its Authorized Agent.

Countersigned:

A. V. LARTER,
Attorney in Fact.

[Endorsed]: Filed November 2, 1942. [29]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

To the plaintiffs, Chester A. Lamberson and Lydia Lamberson, husband and wife, and their counsel, Messrs. W. S. Holden of Idaho Falls, Idaho, and Walter H. Anderson and Clyde Bowen of Pocatello, Idaho, and to the Honorable W. D. McReynolds, Clerk of said Court:

Now comes Montgomery Ward and Company, a corporation, the defendant in the above entitled cause, and moves this Court for an order setting aside the judgment herein and granting a new trial in the above entitled cause on the following grounds and for the following reason, viz:

I

That the findings of fact and conclusions of law do not support the judgment and that the judgment is contrary to the facts and contrary to law in the following particulars:

(a) That there was no evidence introduced at the trial showing that the defendant had knowledge of the presence of water on the ramp of the store entrance upon which Lydia Lamberson alleged she fell.

(b) That there was no showing that there was water present on the ramp or floor of the vestibule for a sufficient length of time to give or charge defendant with constructive notice thereof, for, as a matter of law, only a long continued defective condition will result in such constructive notice, but on the contrary, in this case the proof showed that the condition complained of had existed if at all, for a few minutes only.

(c) That there was no proof that the presence of water on the ramp, if any, was a condition that was not obvious to the said defendant and as well within the knowledge of the plaintiff as the defendant.

(d) That there was no sufficient proof of want of contributory negligence on the part of the said defendant, Lydia [30] Lamberson, but on the contrary there was sufficient evidence proving that she was contributorily negligent in respect to her disregard of an obvious condition, and that she assumed any risk incident to the use of the ramp.

(e) That under the proofs adduced at the trial

no lawful judgment could or should have been made or entered therein except a judgment in favor of the defendant and against the plaintiffs.

II

Insufficiency of the evidence to support or justify the findings of fact, conclusions of law and judgment, and that the said findings of fact, conclusions of law and judgment entered herein are each and all against law.

III

Accident, surprise, mistake and misfortune in the preparation for the trial and in the conduct of the trial which ordinary prudence and diligence could not have guarded against in the following particulars, to wit:

(a) The attendance of a witness for the defendant, to wit, Corporal Harold Dee Tracey, could not be secured for the reason that he had been for some months prior to the date of said trial enlisted in the armed forces of the United States of America, and his exact whereabouts could not be ascertained by the exercise of reasonable diligence and no communication could be had with said Harold D. Tracey, and it was indicated to an agent of the defendant that Tracey's absence from army flying school would not be permitted by his commanding officer, which was not ascertained until October 14th, 1942, the day before the trial.

(b) That the attendance of a witness, to wit, Russell Molen, could not be secured for the reason that said Molen for some months prior to said

trial had been a civilian employee of the United States Army Flying Service, and his absence from his duties would not be permitted by his commanding officer, which was not ascertained until October 14th, 1942, the day before the trial.

(c) That the attendance of the said witnesses Tracey [31] and Molen, could not be enforced because of their exemption from the service of process, to wit, a subpoena, under a Federal statute ordinarily referred to as the Soldiers and Sailors Relief Act.

(d) That the defendant was surprised at the testimony of the plaintiff Lydia Lamberson, at the said trial, in that the said plaintiff gave entirely different testimony relative to the place of her fall and the manner of her fall than the defendant would have been able to show if the said witness Harold Lee Tracey had been procurable.

IV

That a new trial is necessary to prevent a failure of justice in that:

(a) The evidence of the said Harold Dee Tracey would conclusively prove that plaintiff Lamberson did not slip on a wet ramp in the manner she described in her testimony but that she fell face downward and laid on her abdomen, the upper half of her body lying on the sidewalk adjoining the ramp on the west, and the lower half of her body, face downward, laid on the floor of the ramp.

(b) That said Tracey reached the side of said

plaintiff to assist her up within a few seconds of the time plaintiff fell and the ramp was dry when said Tracey reached the fallen plaintiff.

V

That the amount of the judgment allowed for general damages was excessive for the following reasons:

(a) That the injury to the plaintiff, Lydia Lamberson, was not sufficient to cause, and did not cause, permanent disability in respect to her ability to carry on her regular occupations as a saleswoman and a housewife.

(b) That the proof offered by the defendant showed that recovery was seventy five per cent complete and will increase with time and the ordinary use of the wrist.

(c) That a first class reduction of the fracture resulted from her treatment by her own physician.

[32]

(d) She produced no expert testimony proving permanency of injury.

VI

Error in law occurring on the trial of said cause in the admission of evidence hereinafter detailed over the objection of the defendant and in the following particulars, to wit:

(a) It was erroneous to allow the plaintiff Lydia Lamberson, to testify that the wetted condition of her garments was not caused by her act of urinating when the proof showed that urination occurred while said plaintiff was unconscious;

(b) Evidence of the witnesses Criddle and Thueson to the effect that they were present and saw an employee of the defendant throw water on the floor or ramp of the entrance to the store in which plaintiff Lydia Lamberson, is alleged to have sustained injury, for the reason that the time factor involved in the action of the said employee as testified to by said witnesses Criddle and Thueson, was not connected in any way with the time of day at which the said plaintiff Lydia Lamberson, is alleged to have fallen; further that said testimony was not admissible unless it had been first shown that the wetting of the ramp or vestibule occurred prior to the time that the said Lydia Lamberson is alleged to have fallen, and, therefore, the proper foundation for the admission of said testimony was not laid by the plaintiff.

VII

Newly discovered and material evidence discovered since the trial, and which was not and which could have not been obtained on the trial by the exercise of reasonable diligence as more fully appears from the affidavits of Sergeant Harold D. Tracy and Otto E. McCutcheon attached hereto and made a part hereof. That said newly discovered evidence consists of the following: Whereas, heretofore it has been thought by counsel and various employees of the defendant that there was no eye witness to the fall of the plaintiff, Lydia Lamberson, it now appears from the affidavit of the said Tracy that he actually was in a position to see

and did see said plaintiff fall and immediately ran to her assistance after seeing her fall. That said evidence [33] was not discovered by any one representing the defendant until receipt of the affidavit of the said Tracy which came into the hands of the affiant McCutcheon on the 4th day of December, 1942. That said plaintiff, Lydia Lamberson, fell near the outer or westerly edge of the ramp or entrance and that she fell forward face downward on the front of her body, and that about one half of her body projected on to the sidewalk and one half was on the ramp. That the ramp was dry at the time plaintiff fell.

This motion will be based upon the affidavits of G. W. Miller, William A. Voss, Sergeant Harold D. Tracy, and Otto E. McCutcheon, all of which are attached hereto and made a part hereof; also upon all the files and records in the said action including a transcript of the testimony which has been ordered from the reporter but which has not been received at the date hereof; also upon the minutes of the Clerk and the Court taken at the trial and a brief to be hereafter served and filed under Rule 30 of this Court. Said motion is also based upon the provisions of Rule 50 of this court. Reference is also made to the order of the Court heretofore made and entered herein by the trial judge, William Healy, Circuit Judge presiding, under date of October 28th, 1942, during the October term of said Court at which said judgment was entered, under the terms of which proceedings were stayed and defendant was given forty

two days time, to wit, until December 9th, 1942, within which to serve and file said motion for a new trial.

Dated December 7th, 1942.

OTTO E. McCUTCHEON,

Attorney for Defendant.

Residence and P. O. Address:

Idaho Falls, Idaho.

[Endorsed]: Filed December 8, 1942. [34]

[Title of Court and Cause.]

AFFIDAVIT OF G. W. MILLER

State of Idaho,

County of Bonneville—ss.

G. W. Miller, being first duly sworn, on oath deposes and says:

That he is a citizen of the United States and a resident of the State of Idaho; that since on or about the 5 day of September 1941, he has been the manager of the Idaho Falls store of the defendant and the immediate superior of employees therein. That on the 26th day of November, 1941, there was in the employ of defendant at Idaho Falls Harold Dee Tracy and Russell Molen. That among the duties of the said Tracy he was charged with keeping sidewalks, entrances, and floors clean and selling merchandise in the shirt section, and in the performance of his said duties on the said 26th day of November, 1941, he observed a woman fall face downward on the ramp of the third en-

trance from the southwest corner of the said store, and said person was trying to rise to her feet after she had fallen. That said Tracy made a sketch showing the position of the fallen person at the request of William A. Voss and the affiant and the said sketch is now attached to an affidavit of the said Voss presented herewith in support of a motion for a new trial. That said Tracy left defendant's employ on or about the 12th day of February 1942, to go into the army of the United States. That on or about the 25th day of September, 1942, affiant was informed by counsel that the case of Lamberson, et ux. vs. Montgomery Ward & Company, was set for trial for the 15th day of October, 1942, and affiant immediately began a search for the purpose of ascertaining the whereabouts of the said Tracy and was told by persons who purported to know that Tracy was at a flying school at Wichita Falls, Texas, and affiant wrote said witness at that address; affiant never received a reply to said letter and the same was never returned; that affiant continued to make search and inquiry as to the whereabouts of the said Tracy and was later informed that he had been trans- [35] ferred to a flying school at Blytheville, Arkansas; that affiant again wrote the said Tracy at the latest address given asking him to secure permission from his commanding officer to have a leave of absence from his duties so as to attend the said trial and testify in said case, and asking him, Tracy, to reply if a furlough could be secured; that said letter was never returned

and said Tracy never answered, indicating that the commanding officer would not allow him to absent himself from his service in the army; that affiant undertook to secure the attendance of the said Russell Molen but that the said Molen advised affiant that the military commanders would not allow him, Molen, leave to attend said trial. That affiant believes that if the testimony of the said Tracy had been available, the trial court would have found in favor of the defendant and against the plaintiffs. This affidavit is made for the purpose of supporting defendant's motion for a new trial.

G. W. MILLER.

Subscribed and sworn to before me this 5th day of December, 1942.

[Seal]

LOUISE KEEFER,

Notary Public.

Residing at Idaho Falls,
Idaho. [36]

[Title of Court and Cause.]

AFFIDAVIT OF WILLIAM A. VOSS

State of Illinois,

County of Cook.—ss.

William A. Voss being first duly sworn on his oath deposes and says:

That in the months of December, 1941, and January and February, 1942, he was employed as a lawyer in the Law Department of defendant Mont-

gomery Ward & Company at its office and store in the State of California. That at the times mentioned affiant was the lawyer to whom was reported claims for accidents occurring at stores of the defendant in the State of Idaho and elsewhere. That on or about the 12th day of December, 1941, affiant's attention was directed to an accident which it was alleged occurred on premises of the Idaho Falls, Idaho, store, in which it was claimed that one of the plaintiffs, Lydia A. Lamberson, had fallen on a ramp or entranceway situated north of B Street and facing Shoup Avenue in said city, and thereupon affiant took charge of said case and made an investigation of the facts relative to the claim of the said Lydia A. Lamberson and in pursuance of such investigation affiant requested G. W. Miller, store manager of the Idaho Falls store, and Harold D. Tracey to furnish information to affiant which would furnish facts upon which affiant might properly weigh the question of allowing or rejecting a claim for damages which the said Lydia A. Lamberson had made on said defendant through plaintiffs' attorney, William S. Holden of Idaho Falls. That as to statements from said Harold D. Tracey affiant requested that said Tracey should set forth in complete detail all he knew about the alleged accident including a statement showing exactly where the customer was lying when he found her and in what position she was lying. That he should prepare a sketch showing the relative location of the west line of the ramp or vestibule and the east line of the sidewalk on the westerly face of

the store showing as nearly as possible exact conditions existing represented by the time immediately after Mrs. [37] Lamberson's fall and the few *second* which elapsed between the instant of the fall and the instant that Tracey ran to the prostrate customer. In response to affiant's request for such information and diagram there was prepared by or under the direction of said Harold D. Tracey a sketch indicating thereon the information which had been requested by the affiant, and the original sketch as furnished to affiant on or about the 12th day of February, 1942, is attached hereto marked Exhibit A, and made a part hereof. That said sketch remained in affiant's possession in his office at Oakland, California, until the same was transmitted to Otto E. McCutcheon, Idaho Falls, Idaho, after the plaintiffs had commenced their suit against the defendant in the above entitled court and cause. That copies of said sketch are attached to copies of this affidavit and made parts thereof. That this affidavit is made for the purpose of supporting defendant's motion for a new trial of the said action.

WILLIAM A. VOSS

Subscribed and sworn to before me this 30th day of November, 1942.

[Seal]

EMILY HOCH

Notary Public.

Residing at: Chicago, Ill.

My Commission Expires

Dec. 23, 1942. [38]

Exhibit A

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Woman was on hands and
knees trying to get up
when found by Mr. Tracy.



AFFIDAVIT OF HAROLD D. TRACY

State of Arkansas,
County of Mississippi:

I, Sergeant Harold D. Tracy, having first been duly sworn state: That on the 26th day of November, 1941, I was employed as salesman by Montgomery Ward Company, in Idaho Falls, Idaho. In the early part of the afternoon of November 26, 1941, and while I was working in the shirt department on the ground floor, and near the front entrance, my attention was attracted by a woman whose name I afterwards learned was Lydia Lamberson, falling just in the entrance to the building. I immediately ran to her, and when I reached her she was kneeling with her feet and lower limbs inside of the entrance, and her hands and upper portion of her body on the adjoining sidewalk; I assisted this woman to her feet, and helped her into the store, and there turned her over to the Assistant Manager, Mr. Earl Hoops. As I assisted this woman to her feet she remarked that she believed her arm was broken. This was the only remark made by her in my presence. The weather was good, and the entrance to the store and sidewalk were dry. I had not thrown water on the entrance to the building before or after the fall, or at any other time that entire day. Shortly after the fall I made and furnished to Mr. Miller a sketch showing Lydia Lamberson's position in the entrance at the time I discovered, and assisted her to her feet.

This the 30th day of November, 1942.

SGT. HAROLD D. TRACY

To the above statement was subscribed and sworn to before me a Notary Public by Sergeant Harold D. Tracy this the 30th day of November, 1942. Witness my hand and seal as such Notary Public this the 30th day of November, 1942.

R. P. KIRSHMER

Notary Public [40]

[Title of Court and Cause.]

AFFIDAVIT:

State of Idaho,

County of Bonneville—ss.

Otto E. McCutcheon being first duly sworn deposes and on oath says:

That he is the local counsel for defendant and was employed in said capacity immediately after the said case was commenced. That in the file affiant received from William A. Voss, counsel for defendant at Oakland, California, was a sketch purporting to show the position of plaintiff Lydia Lamberson as she fell and immediately after she had fallen on the ramp of the Idaho Falls store November 26th, 1941. That said sketch was retained in the possession of affiant until he attached it to the affidavit of William A. Voss submitted herewith in support of defendant's motion for a new trial. That on December 4th, 1942, affiant re-

ceived the affidavit of Harold D. Tracy attached to the foregoing motion for new trial, and until that date affiant had been informed by agents of defendant that there were no eye witnesses to the plaintiff's fall, whereas the fact was otherwise in that Tracy saw plaintiff fall and ran to her assistance immediately; that affiant was surprised by the developments and presents the facts as they now appear in support of defendant's motion for a new trial; that on October 14th, 1942, affiant caused subpoenas to be issued by the Clerk of the Court requiring Tracy and Molen to appear as witnesses for defendant, and placed same in the hands of the Marshal for service, but same was returned with a certificate that said witnesses could not be found.

OTTO E. McCUTCHEON

Subscribed and sworn to before me this 5th day of December, 1942.

[Seal]

LOUISE KEEFER

Notary Public.

Residing at Idaho Falls,
Idaho.

(Service Accepted). [41]

[Title of Court and Cause.]

NOTICE OF
HEARING ON MOTION FOR NEW TRIAL

To the Defendant and its Counsel, Otto E. McCutcheon, Esq.:

You are hereby notified that pursuant to Rule 18 of Rules of Practice of the U. S. District Court for the District of Idaho the Motion for a New Trial filed herein is called up for a hearing, please govern yourself accordingly.

Done at Pocatello, Idaho, this 23rd day of December, 1942.

WM. S. HOLDEN

Res: Idaho Falls, Idaho

CLYDE BOWEN

Res: Pocatello, Idaho

W. H. WITTY

WALTER H. ANDERSON

Res: Pocatello, Idaho

Attorneys for Plaintiff

(Affidavit of Mailing Attached).

[Endorsed]: Filed December 26, 1942. [42]

ORDER DENYING MOTION
FOR NEW TRIAL

In Chester A. Lamberson et al v. Montgomery Ward & Company, No. 1183-E, the motion for a new trial is denied.

Dated January 29, 1943.

WILLIAM HEALY

United States Circuit Judge

cc OTTO McCUTCHEON

Idaho Falls, Idaho

WALTER H. ANDERSON

Pocatello, Idaho

[Endorsed]: Filed February 1, 1943. [43]

[Title of Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Montgomery Ward and Company, a corporation, the above named defendant, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment, and the whole thereof, made and entered in the above entitled court and cause on the 28th day of October, 1942, which said judgment was in favor of the plaintiffs herein and against the defendant.

Dated this 22 day of January, 1943.

OTTO E. McCUTCHEON

Attorney for Defendant.

Residence and Post Office

Address:

Idaho Falls, Idaho.

[Endorsed]: Filed January 22, 1943. [44]

[Title of Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That We, Montgomery Ward and Company, a corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation, organized under the laws of the State of Maryland, and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound to Chester A. Lamberson and Lydia Lamberson, the plaintiffs and appellees in the above entitled cause, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to which payment well and truly to be made we bind ourselves and our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22 day of January, 1943.

Whereas, on the 28th day of October, 1942, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that court, wherein Chester A. Lamberson and Lydia Lamberson were plaintiffs, and Montgomery Ward and Company, a corporation, was defendant, a judgment was rendered against said defendant in the sum of Nineteen Hundred Forty-Five (\$1945.00) Dollars with costs taxed at Thirty-six (\$36.00) Dollars, and said defendant having filed in the office of the Clerk of said District Court

a notice of appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

Now, the condition of this obligation is such, that if said Montgomery Ward and Company, a corporation, the appellant, shall prosecute said appeal and pay all costs if the appeal is dismissed, or the judgment affirmed, or such costs as the appellate court may award if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

MONTGOMERY WARD AND

COMPANY, a corporation [45]

By OTTO E. McCUTCHEON

Its attorney of record.

Residing at Idaho Falls,

Idaho,

Principal.

UNITED STATES FIDELITY

AND GUARANTY COM-

PANY, a corporation,

[Seal] By A. V. LARTER

Its attorney in fact,

Surety.

F. O. SIMONSON

Resident Agent. [46]

GENERAL POWER OF ATTORNEY

No. 55226

Know All Men By These Presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing

under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint A. V. Larter of the City of Idaho Falls, State of Idaho its true and lawful attorney in and for the County of Bonneville for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said A. V. Larter may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 10th day of January, A.D. 1939.

UNITED STATES FIDELITY
AND GUARANTY
COMPANY.

By M. BARRATT WALKER
(Signed) Vice-President.

[Seal] J. E. GITTINGS
(Signed) Assistant Secretary.

State of Maryland
Baltimore City,—ss.

On this 10th day of January, A. D. 1939, before me personally came M. Barratt Walker, Vice President of the United States Fidelity and Guaranty Company and J. E. Gittings, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they [47] resided in the City of Baltimore, Maryland; that they, the said M. Barratt Walker and J. E. Gittings were respectively the Vice President and the Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice President and Assistant Secretary, respectively, of the Company.

My commission expires the first Monday in May, A.D. 1939.

[Seal]

A. D. PATRICK

(Signed) Notary Public.

State of Maryland,
Baltimore City,—Sct.

I, M. Luther Pittman, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that

A. D. Patrick, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 10th day of January, A.D. 1939.

[Seal]

M. LUTHER PITTMAN

(Signed) Clerk of the Superior Court
of Baltimore City.

COPY OF RESOLUTION

That Whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys [48] with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, be it Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant

Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performances of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also, in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obliga-

tion, stipulation, or undertaking, or anything in the nature of either of the same.

I, Robert H. Sayre, an Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the foregoing is a full, true and correct copy of the original power [49] of attorney given by said Company to A. V. Larter of Idaho Falls, Idaho, authorizing and empowering him to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said Power of Attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of July, 1910, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In Testimony Whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company this 10th day of January, 1939.

[Seal]

ROBERT H. SAYRE

Assistant Secretary.

[Endorsed]: Filed January 22, 1943. [50]

[Title of Court and Cause.]

PETITION FOR APPROVAL OF
SUPERSEDEAS AND STAY ON APPEAL:

Comes now Montgomery Ward and Company, a corporation, the above named defendant and appellant, and represents as follows:

That judgment was entered in the above entitled court and cause on the 28th day of October, 1942, in favor of Chester A. Lamberson and Lydia Lamberson, plaintiffs, and against Montgomery Ward and Company, a corporation, defendant, for Nineteen Hundred Forty-five (\$1945.00) Dollars, and costs of suit taxed at Thirty-six (\$36.00) Dollars; that said defendant has appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and desires the court to fix the amount of a Supersedeas Bond, approve the form thereof, and also approve the United States Fidelity and Guaranty Company, a corporation, as surety, and thereupon order a stay of proceedings according to law.

Now, therefore, petitioner prays that the Court fix the amount of said supersedeas bond, approve the bond tendered herewith, and the surety thereon, and order a stay according to law.

Dated this 22 day of January, 1943.

OTTO E. McCUTCHEON

Attorney for Defendant.

Residence and Post Office

Address: Idaho Falls, Idaho.

[Endorsed]: Filed January 22, 1943. [51]

[Title of Court and Cause.]

ORDER APPROVING BOND AND
GRANTING A STAY OF EXECUTION

The defendant, Montgomery Ward and Company, a corporation, having filed its notice of appeal from the judgment rendered in the above entitled cause in favor of the plaintiffs, Chester A. Lamberson and Lydia Lamberson, and against the defendant Montgomery Ward and Company, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed its petition for an order fixing the amount of a supersedeas bond and approving the bond tendered by said appellant, and the surety executing the same, and granting said stay of proceedings.

Now, therefore, It is Hereby Ordered, that the amount of said supersedeas bond be and it is hereby fixed in the sum of Three thousand (\$3,000.00) Dollars, and the bond tendered by the said defendant Montgomery Ward and Company, a corporation, in said sum with the United States Fidelity and Guaranty Company, a corporation, as surety, be and the same is hereby in all respects approved and that all proceedings herein for the collection of said judgment be and they are hereby stayed according to law.

Dated this 2nd day of February, 1943.

LLOYD L. BLACK

U. S. District Judge

Acting as District Judge for said District
of Idaho under designation.

[Endorsed]: Filed February 2, 1943. [52]

[Title of Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That We, Montgomery Ward and Company, a corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation, organized under the laws of the State of Maryland, and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound unto Chester A. Lamberson and Lydia Lamberson in the full and just sum of Three Thousand Dollars (\$3,000.00), lawful money of the United States of America, to be paid to the said Chester A. Lamberson and Lydia Lamberson, their heirs, executors, administrators or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22nd day of January, 1943.

Whereas, lately in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in said Court between Chester A. Lamberson and Lydia Lamberson, as plaintiffs, and Montgomery Ward and Company, a corporation, as defendant, a judgment was rendered in favor of the plaintiffs and against said defendant in the sum of Nineteen Hundred Forty Five (\$1945.00) Dollars, and bearing interest at the rate of six per cent per annum from the date thereof, to wit: On the 28th day of October, 1942, with

costs taxed and amounting to the sum of Thirty six (\$36.00) Dollars, and said Montgomery Ward and Company, a corporation, having filed in said Court a notice of appeal to reverse said judgment in the aforesaid suit on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be held in San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if said Montgomery Ward and Company, a corporation, shall prosecute said appeal to effect, and satisfy the said judgment in full, [53] together with costs, interest and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award against it, then the above obligation to be void; otherwise to remain in full force and virtue.

MONTGOMERY WARD AND
COMPANY,

a corporation,

By OTTO E. McCUTCHEON

Its attorney of record.

Residing at Idaho Falls,
Idaho, Principal.

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY,

a corporation,

By A. V. LARTER

[Seal]

Its attorney in fact,

Surety.

F. O. SIMONSON

Resident Agent.

The foregoing Bond is approved as to sufficiency, form and surety, and is allowed as a Supersedeas this 2nd day of January, 1943.

LLOYD L. BLACK

District Judge.

(General Power of Attorney, No. 55226, printed in full as attached to Appeal Bond also attached to this Supersedeas Bond.)

[Endorsed]: Filed February 2, 1943. [54]

[Title of Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 15, 1942

This cause came on for trial before the Court without a jury. Messrs. Clyde Bowen, W. H. Anderson and William S. Holden appeared as counsel for the plaintiffs, and Otto E. McCutcheon, Esquire, appeared as counsel for the defendant.

Lydia Lamberson, Chester A. Lamberson, Ethel Criddle, Elaine Merrill and Mrs. Chilson were sworn and examined as witnesses and documentary

evidence was introduced on the part of the plaintiffs, and here the plaintiffs rest.

Dr. C. M. Cline, C. W. Miller, Onita Williams and C. D. Peterson were sworn and examined and other evidence was introduced on the part of the defendant, and here the defendant rests.

On rebuttal, Lydia Lamberson was recalled and further examined, and here both sides close.

Both parties were granted leave to submit memorandums of authorities within a few days, and the cause was submitted without argument otherwise. [55]

[Title of Court and Cause.]

CIVIL DOCKET ENTRIES

1942

Jun. 5—File complaint

Jun. 5—Issue sommons

Jun. 12—File summons—served

Jun. 15—File motion to dismiss and motion for more definite statement, and notice of motion

Jun. 22—File notice to present motions on briefs

Jun. 25—File defendant's brief on motions

Jun. 29—File plaintiff's reply brief on motions

Jul. 7—File Order on motion for more definite statement, motion to dismiss, motion for bill of particulars, etc.

Jul. 7—Copies of order to Clyde Bowen, Otto E. McCutcheon, Walter H. Anderson and Wm. S. Holden

- Jul. 20—File bill of particulars
- Jul. 24—File stipulation re: Aug. 12 to answer
- Aug. 11—File answer
- Oct. 14—File Prae, Issue Subp D. T.—Dr. A. R. Sodaquist—for plaintiff
- Oct. 14—File Subp—Dee Tracey and Russell Olen not found
- Oct. 15—Record of trial
- Oct. 20—File defendant's brief
- Oct. 20—File opinion
- Oct. 24—File notice to tax costs
- Oct. 24—File memorandum of Costs and disbursements
- Oct. 28—File notice of motion for stay of proceedings
- Oct. 28—File findings of fact and conclusions of law
- Oct. 28—File motion for stay of execution
- Oct. 28—File judgment (Plff—\$1945.00 & \$36.00 costs)
- Oct. 28—Copy of judgment handed to defendant's counsel
- Oct. 28—File order granting stay of execution
- Nov. 2—File bond staying execution
- Dec. 8—File motion for new trial
- Dec. 26—File notice to submit motion for new trial 1943
- Jan. 2—File brief on motion for new trial [56]
- Jan. 5—File plff's brief on motion for new trial
- Jan. 8—File affidavit of mailing copy of deft's brief
- Jan. 8—File defendant's brief in reply

- Jan. 22—File notice of appeal
Jan. 22—Copies of notice to Clyde Bowen and
Walter H. Anderson
Jan. 22—File cost bond on appeal
Jan. 22—File petition for approval of Supersedeas,
etc.
Jan. 28—File transcript
Feb. 1—File order denying motion for new trial
Feb. 2—File supersedeas bond
Feb. 2—File order approving bond and granting
stay of execution
Feb. 2—File motion and order for additional at-
torneys for defendant
Feb. 18—File statement of points, etc.
Feb. 18—File designation of contents of record on
appeal [57]
-

[Title of Court and Cause.]

STATEMENT OF POINTS ON WHICH DE-
FENDANT INTENDS TO RELY ON AP-
PEAL

Comes now the defendant-appellant, Montgomery Ward and Company, a corporation, and makes the following Statement of the Points upon which it intends to rely in the appeal taken to the United States Circuit Court of Appeals of the Ninth Circuit in the above entitled cause:

I.

That the court erred in denying the motion of the defendant for an order requiring plaintiffs to

make a more definite statement of their alleged cause of action referred to as paragraph Second and sub-paragraphs (a) and (b), for the reason that the said complaint was uncertain and indefinite in the particulars described in said sub-paragraphs and each of them.

II.

(1) The court erred in finding that the defendant was negligent in allowing water to be and remain upon the ramp or entrance way without any sand or ashes or some matting to cover the same;

(2) The court erred in finding that at the time of plaintiff's injury the ramp or entrance way was under the exclusive control of the defendant;

(3) The court erred in finding that the plaintiff fell upon the ramp or entrance way as a proximate cause of the same being wet and that the same was wet due to defendant's negligence and the absence of ashes or sand or matting upon said ramp;

(4) The court erred in finding that the plaintiff, Lydia Lamberson, was not contributorily negligent in passing out and over said ramp or entrance way;

(5) The court erred in finding that the defendant did not give plaintiff, Lydia Lamberson, any warning or notice of water being upon said ramp or entrance way prior to or at the time of her passing out and over the same: [58]

(6) The court erred in finding that the said ramp or entrance way was unsafe for patrons and persons using same because there were no ashes, sand or matting thereon;

(7) The court erred in admitting the testimony

of Lydia Webb Theusen and Ethel Criddle regarding the presence of water on the ramp in question for the reason that it was not shown that said testimony was related to the time of the accident.

III.

That the evidence is insufficient to support a finding that defendant was guilty of any negligence as charged in the complaint, or at all, for which reason the Court erred in making and entering its findings of fact, and conclusions of law and judgment in favor of the plaintiffs.

IV.

That under the proofs submitted the only lawful judgment which could or should have been entered in said cause was a judgment in favor of the defendant and against the plaintiffs.

That the reasons for the foregoing Statement of Points are set forth as follows:

a. There was no proof that defendant had knowledge of the presence of water on the ramp or floor of the store entrance upon which plaintiff Lydia Lamberson alleged that she fell.

b. There was no proof that there was water present on the ramp or floor of the entrance for a sufficient length of time prior to the alleged fall of the plaintiff Lydia Lamberson to give or charge defendant with constructive notice thereof.

c. The proof affirmatively shows that the presence of water on the ramp or floor of the entrance to the store as alleged by plaintiffs was visible and

obvious to the plaintiff Lydia Lamberson, and thus she had knowledge thereof.

d. There was proof that plaintiff Lydia Lamberson was contributorily negligent in disregarding the dangers of an obvious condition of which she had knowledge and the defendant had none, and that plaintiff Lydia Lamberson, assumed any risk incident to her use of the ramp and stepping into a spot of water which she alleges was on said ramp or floor at the moment. [59]

e. The defendant was not an insurer of the safety of the plaintiff Lydia Lamberson as an invitee.

V.

That the Court erred in awarding to the plaintiffs a lump sum of money for general damages without specifying what portion of said award was for permanent injuries alleged to have been sustained by the said plaintiffs.

Respectfully submitted,

W. B. POWELL

Residence: 2825 East 14th
Street, Oakland, California.

W. L. SCHOENER

Residence: 2825 East 14th
Street, Oakland, California.

OTTO E. McCUTCHEON

Residence: Idaho Falls, Idaho
Attorneys for the Appellant-
Defendant.

(Service Accepted.)

[Endorsed]: Filed Feb. 18, 1943. [60]

[Title of Court and Cause.]

TRANSCRIPT

This matter came on for hearing at Pocatello, Idaho, before the Honorable William Healy, United States Circuit Judge, presiding. Trial was held October 15, 1942, without a jury.

APPEARANCES

William S. Holden, Esq.,

Idaho Falls, Idaho

Clyde Bowen, Esq.,

Pocatello, Idaho

Messrs. Witty and Anderson,

Pocatello, Idaho

Attorneys for the Plaintiffs.

Otto E. McCutcheon, Esq.,

Idaho Falls, Idaho

Attorney for the Defendant. [61*]

The Court: Are you gentlemen ready in the matter set for this morning, Lamberson against Montgomery Ward and Company.

Mr. Bowen: The plaintiff is ready.

Mr. McCutcheon: We are ready.

* Page numbering appearing at foot of page of original Reporter's Transcript.

MARY LYDIA LAMBERSON

Being called as a witness on behalf of the plaintiff,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen.

Q. State your full name.

A. Mary Lydia Lamberson.

Q. Are you married Mrs. Lamberson?

A. Yes, sir.

Q. What is your husband's name?

A. Chester A. Lamberson.

Q. Will you state if you are one of the plain-
tiffs in this action? A. Yes sir.

Q. The action of Lamberson versus Montgomery
Ward and Company. A. Yes sir.

Q. How long have you and Mr. Lamberson been
married?

A. Almost thirty-five years.

Q. How old are you? [63]

A. I am 57 now, and we have been married almost
thirty-six years, I said thirty-five and should have
said thirty-six.

Q. Where is your home?

A. 500 L street, Idaho Falls, Idaho.

Q. How long have you lived in Idaho Falls?

A. Since 1902.

Q. Directing your attention to the 26th of No-
vember, 1941, where were you living at that time?

A. 500 L. Street, Idaho Falls, Idaho.

Q. Together with Mr. Lamberson, as husband
and wife. A. Yes sir.

(Testimony of Mary Lydia Lamberson.)

Q. On that date—November 26, 1941, were you engaged in any occupation of any kind?

A. Yes sir.

Q. Other than housewife. A. Yes sir.

Q. What was that?

A. Cosmetic saleswoman.

Q. Just tell the Court—strike that please—did you on that date go to Montgomery Ward and Company's store in Idaho Falls? A. Yes I did.

Q. Can you tell the Court the names of the street near Montgomery Ward and Company store?

A. Yes, the one on the South is B street and the one on the [64] north is C street, running east and west.

Q. What street does the store face on?

A. That is Shupe street—or Shupe avenue..

Q. Do you know how many entrances there were on Shupe Avenue going into that store on November 26, 1941? A. Four I think.

Q. Describe the direction you took in entering the store on that day, if you will Mrs. Lamberson?

A. I came down town and parked the car on C street and went into the third door into the men's department.

Q. From which way are you counting when you say the third entrance into the store?

A. The third from the south.

Q. What department did that go in?

A. Into the men's department.

Q. Did you have occasion to go in there?

A. Yes, I was shopping and I thought I would find something for Christmas.

(Testimony of Mary Lydia Lamberson.)

Q. Approximately what time was it that you went into the store on that day?

A. About three o'clock.

Q. When did you say?

A. About three o'clock in the afternoon.

Q. How long were you there and what did you do?

A. I was there about thirty minutes and went to the next [65] division, and then I looked at some hosiery, lingerie and Christmas presents.

Q. After being in the store that length of time what did you do?

A. I went to the ready-to-wear department. I went through that middle section in that ready-to-wear department and I turned north and when I got up the steps I visited a while and looked around and I came down to the men's department and that is the way I left the store.

Q. What door did you leave through?

A. The third door from the south.

Q. Is that the door you entered?

A. Yes sir.

Q. Did anything occur when you left the store.

A. I had to open the door and as I stepped out, I took about the second step and I slipped. I seen water in the doorway as I went down. It took both my feet from under me and in order to save my hip from being broken I fell on my wrist and I broke my wrist.

Q. Describe the entrance way there, what it is constructed of.

(Testimony of Mary Lydia Lamberson.)

A. Tile, it is a kind of a wide entrance and I cut the corner pretty close and was close to the window on the left as I went down.

Q. Tell us, if you can—describe the entrance-way, where does it commence and where does it end, about how long it is Mr. Lamberson. [66]

A. I don't know how long it is. It commences at the edge of the sidewalk and runs into the store.

Q. Where was it with regard to the edge of the sidewalk that you fell?

A. When I fell down my feet lacked about eighteen inches of being to the sidewalk, on the slick tile.

Q. When you went into the store was there any water on that entrance?

A. No sir. I went in on the other side and there was no water.

Q. What occurred after you fell?

A. I thought to myself, I have broke my arm as sure as shooting, that is the way I said it. I didn't have any means of getting up. On the left side there wasn't any room and I put my hand down and I couldn't put any pressure on it because of the pain, I was sick and I didn't know how I would get up, and just then someone came to the door and said "did you fall" and I said "I certainly did and I think I have a broken arm." He took me back to the manager and said "here is a lady that fell in the entrance and she thinks she has a broken arm.

Q. Were you experiencing any pain at that time?

(Testimony of Mary Lydia Lamberson.)

A. I was in such pain I didn't know where I was at. I was getting sick and I could hardly keep on my feet.

Q. Where were you experiencing the pain?

A. In my right wrist and arm. [67]

Q. What occurred when you were taken back to the store?

A. One fellow took me back to the manager and the manager said: "Can you move your fingers," and I said "yes." They pulled out a stool for me to sit on and I moved them just about as good as I can now. He said: "If you can move your fingers I don't think your arm is broken," and I said: "I hope not but I think it is."

Q. What was done for you?

A. You mean then.

Q. Yes, what was done for you.

A. Well, I was sitting on the stool getting sicker, I was in misery. I couldn't hardly stand it and a couple of ladies and a man came up and asked who I was and where I lived and what doctor I preferred and I told them. I asked for a glass of water; they got me the glass of water and one of the ladies got some bandage and gave first aid. I said if I could get my head down I wouldn't faint away. After I told them several times they took me back to the back, and the next thing I knew I was lying on my back in front of the shoe chairs.

Q. You say that two ladies came up to you, were they employees of the store.

(Testimony of Mary Lydia Lamberson.)

A. Yes sir. They were all employees, the ladies and the man too, they all worked there.

Q. Did you know the names of either of them?
[68]

A. No sir, I didn't.

Q. Next thing you knew, I believe you said, you were lying down, do you know how you came to be lying down?

A. I suppose I fainted away. The first thing I remember the lady pulled my skirt down. I had a heavy skirt on and she said "how do you feel now," and the man who was rubbing my left hand he left about that time, and she said, "do you think you can get up," and between her help and mine I got up and sat in the chair.

Q. Did you have any water on any part of your clothing?

A. I noticed my right hose was wet above the ankle.

Q. How long were you at the store after you were hurt, before you left the store?

A. About ten minutes.

Q. Then did you leave the store?

A. Yes sir, they called a taxi and took me to the doctor's office.

Q. Did anyone assist you to the doctor's office?

A. Yes sir, a man assisted me.

Q. What doctor's office did you go to?

A. Doctor Soderquist.

Q. How far is that from the store?

A. About two blocks and up about a quarter.

(Testimony of Mary Lydia Lamberson.)

Q. His office is upstairs or on the ground floor?

A. Yes sir.

Q. Upstairs. [69] A. Yes sir.

Q. How did you get upstairs?

A. The fellow helped me out of the taxi, and this fellow said "you are sure shaking" and I said "I am jerky" and he said "you put your arms around my neck and I will see that you get upstairs".

Q. He did that, and you did?

A. Yes sir.

Q. Was the doctor there?

A. Yes sir, he met me at the office door.

Q. What happened when you got there?

A. He said "it is you is it" and I told him what the manager said, that if I could move my fingers my arm wasn't broken and he said "there is nothing to that," he said "you could move your fingers and still have a broken arm." He said "we will make an X-ray." He took and moved the bone and you could hear it grind. He said "I will take an X-ray" and when he was developing the X-ray I sat there and I got nauseated again and he took me in the office and laid me on the table. When the picture was fixed, he figured it out good, and got a cast and he pulled on my hand and Mr. Lamberson pulled on the upper part of my arm and he put it in a case and bound it.

Q. Was Mr. Lamberson with you when you went to the doctor's office? [70]

(Testimony of Mary Lydia Lamberson.)

A. Not at first, but I think Mr. Cecil Peterson called him and he was there after that.

Q. After the cast was applied what occurred then?

A. I sat up a minute or two and then put on my coat and Mr. Lamberson took me home.

Q. How long was this cast on your arm?

A. Five weeks.

Q. The cast was on five weeks.

A. Yes sir.

Q. Who removed the cast for you?

A. Doctor Soderquist.

Q. What is the fact during this five weeks, as to whether you suffered pain in the wrist—your right wrist?

A. I suffered pain all along. I was flat on my back for two weeks.

Q. Were you able to care for yourself during those two weeks that you say you were flat on your back?

A. No sir, I wasn't.

Q. Did someone take care of you?

A. Yes sir.

Q. Who did?

A. Mr. Lamberson took care of me.

Q. Were you able to do any housework?

A. No sir, I couldn't.

Q. Did someone do your housework for you? [71]

A. Mr. Lamberson was doing all the housework, anyway, he tried to do it.

Q. How long were you confined to your home

(Testimony of Mary Lydia Lamberson.)

and unable to do this work that you have spoken of?

A. I didn't do any housework for about three and a half months. Yes, I guess it was three and a half months before I did any work.

Q. During that time what did you experience in the right wrist?

A. I suffered a lot of pain in it. If I tried to do anything I couldn't. I was sick a lot.

Q. During that time did you do any work as a cosmetic saleswoman?

A. Not to go outside.

Q. How much time were you off from that business after you were hurt?

A. About three months, yes, it was a good three months.

Q. Do you know what your earnings a month were from the sales business?

A. I cannot tell right down to the penny, but it should amount to about sixty dollars a month.

Q. Mrs. Lamberson, immediately after you were injured did you yourself look at your right wrist?

A. Yes, I did.

Q. Describe how it looked.

A. My hand was thrown back this way (illustrating) and my wrist bulged down.

Q. Show the Court where the wrist bulged down.

[72]

A. Right here.

Q. On which hand? A. This hand.

Q. Any swelling on the top of the arm?

(Testimony of Mary Lydia Lamberson.)

A. Swollen bad. There was a spot right there, in fact there is a spot there now. That spot was almost as red as blood at that time.

Q. Is the right wrist as strong as it was before?

A. No sir, it is very, very poor, I cannot peel vegetables, even now.

Q. Do you have as much grip as you had before you were hurt?

A. No sir, I haven't.

Q. Prior to the time you were injured was the wrist deformed or straight?

A. It was straight.

Q. Since your injury what is its condition?

A. I have a badly deformed arm.

Q. Remove your coat and hold up both of your arms?

(Witness did as requested)

Q. Prior to the time you were injured were you able to do your housework?

A. All my life I did my own work. I never had a hired girl more than ten days.

Q. What is the fact as to whether you suffer any pain in the right wrist at this time? [73]

A. I suffer all the time.

Q. And what is the fact as to whether you suffered any pain in the right wrist prior to the time you hurt it?

A. I never did.

Q. And do you have pain now.

A. I have not been free from pain since I broke it. I still suffer pain.

(Testimony of Mary Lydia Lamberson.)

Q. Did you at the time you fell, on November 26 1941, and fractured your wrist, did you injure any other part or portion of your body?

A. I bumped my ankle when I went down. I didn't skin it, but it made it black. It is still black. I also hurt my back at that time.

Mr. Bowen: You may take the witness.

Cross Examination

By Mr. McCutcheon:

Q. When did you first engage in cosmetic selling?

A. About the 17th of September 1941.

Q. Last year. A. Yes sir.

Q. In reply to a question which Mr. Bowen asked about your earnings, you said they should have been about sixty dollars a month. Have you any records to show what your earnings were in that period from September to November 1941?

[74]

A. No sir, I just got a commission.

Q. Had you engaged in that business before that time?

A. No sir, never before September 1941.

Q. So that up to the 17th of November you had been in that business about two months, or just two months?

A. Yes sir, two months.

Q. What line did you sell. A. Avon.

Q. What does it consist of?

A. All cosmetics, lip sticks and so on, men's shaving preparations and then you have extracts.

Q. Did you canvass from door to door?

(Testimony of Mary Lydia Lamberson.)

A. Yes I canvassed from door to door and then I have customers that deal with me regularly.

Q. Did you make any sales by telephone or by customers calling at your home?

A. I never made many.

Q. Some. A. Maybe some.

Q. Can you tell what your earnings were while you were confined to the house?

A. I don't think I could.

Q. How long have you been,—withdraw that,—please strike it,—how long were you confined to the house at that time?

A. Better than three months. [75]

Q. Do you remember of any sales at all during that time?

A. Yes, people called on me, and they called on the phone, but they didn't amount to much. I could have done much better if I could get out.

Q. I was anxious to know what your income was during the time you were home?

A. I cannot tell right now, that was quite a while ago.

Q. Yes, I know. Did you keep books?

A. No sir I didn't.

Q. You didn't keep books before this accident?

A. No, except our household books.

Q. Just your budget. A. Yes sir.

Q. But not on this cosmetic business.

A. No, that's all we kept.

Q. How do you arrive at the earning of \$60.00 a month?

(Testimony of Mary Lydia Lamberson.)

A. I figured my commission.

Q. Did you get the commission out of the \$60.00 or was that the sale and the commission?

A. I got the commission out of what I sold.

Q. What was the commission out of the \$60.00?

A. The commission out would be,—you say out of fifty?

Q. Do you mean that the commission was fifty per cent?

A. No sir, the commission was forty per cent.

Q. I see,—these goods were placed in your hands at a cer- [76] tain price, you got your compensation above that.

A. I had to take orders,—I would get the orders and send them in.

Q. Then you got your commission.

A. I got the goods and got the commission.

Q. Was \$60.00 which you say was the amount of your earnings, the selling price or the commission only?

A. That would be my commission.

Q. How much were your commissions at the time you were confined to your house?

A. Well, my commission would be forty per cent on what I sold.

Q. Can you tell us what that amounted to?

A. I don't remember that.

Q. You remembered the other, the \$60.00 you earned before, but you can't remember after the accident.

(Testimony of Mary Lydia Lamberson.)

A. I didn't remember much after the accident for quite a while.

Q. You didn't do any selling perhaps, for a few days after the accident? A. No sir.

Q. Can you remember the names of the customers you sold to while you were confined to your home? A. No sir, I don't remember.

Q. You don't remember any of them?

A. I have one lady that buys off me most of the time. She doesn't buy much, her name is Madison.

[77]

Q. Is she a beauty operator or just a housewife.

A. Just a housewife.

Q. Where did you say that you parked your car on that day?

A. Between Park Avenue and Shupe, on one of those three hour parking spaces.

Q. And you walked down Shupe Avenue to the entrance. A. That's right.

Q. The first door that you reached was the door to the agricultural implement department?

A. Yes sir.

Q. You didn't go in there. A. No sir.

Q. You entered the first door that a customer of your character would go into. The men's department.

A. Yes sir, I went in the men's department.

Q. What was the condition of the entrance when you went in.

A. The condition of the entrance.

(Testimony of Mary Lydia Lamberson.)

Q. Yes, what was the condition of the entrance when you went in?

A. It seemed to be dry.

Q. What was the weather condition that day in Idaho Falls?

A. A grand day, the sun shone all day.

Q. Do you know what the temperature was at that time?

A. I don't think I know that.

Q. Was it freezing?

A. No, but probably would be about five o'clock.

[78]

Q. This occurred before five.

A. About three-thirty in the afternoon.

Q. About three-thirty.

A. Yes sir.

Q. As you left the store when did you first observe any water in the entrance or the vestibule.

A. I went out of the door and took a couple of steps and slipped. I seen the water at that time.

Q. You didn't see the water before you slipped.

A. Not before I hit it.

Q. How much of an area was there that was wet.

A. Well, I got my coat good and wet.

Q. Did you have rubbers on that day?

A. No sir.

Q. What part of your coat was wet?

A. Right on the back where I sat down.

Q. Do you know how that was caused?

A. Yes sir, going down in the water.

Q. Was there any water on your clothing as you left the store?

(Testimony of Mary Lydia Lamberson.)

A. Yes, my coat was quite wet.

Q. Do you recall as Mr. Peterson helped you into the taxi cab some friends of yours passed by, and they made some remark? A. Yes sir.

Q. Do you know their names?

A. One lady was Mrs. Deschamp. [79]

Q. That is Mrs. Omar Deschamp?

A. Yes sir, the garageman.

Q. It is a fact that you believe that you lost consciousness in the store after this accident?

A. Yes, I did.

Q. Do you know whether anyone cast any water on you while you were lying there or while you were in the store? Do you know, did anyone throw any water on you?

A. When I came to Mr. Peterson was rubbing my hand and there was some water on my wrist.

Q. Had your face been bathed, or was there evidence of water on your face?

A. I cannot recall whether my face was bathed or not. I was too sick for that.

Q. When you left the building just prior to the accident what did you do relative to noticing the pathway from the sidewalk to the door. Did you make any observation?

A. I didn't understand that.

Q. When you opened the door on the way out of the store after doing your shopping, did you look at the floor of the entrance?

A. I looked at the other side when I was sitting there.

(Testimony of Mary Lydia Lamberson.)

Q. Before the accident, as you opened the door on the way out of the store?

A. No sir, I didn't. [80]

Q. You didn't make any observation of the condition there? A. No sir.

Q. Was there any snow on the sidewalk, that you saw? A. Not a bit of snow.

Q. You say that Mr. Lamberson was out of work at the time of the accident and that he did the housework? A. Yes sir.

Q. Have you resumed your selling of cosmetics? A. Yes sir.

Q. When did you take up that work again after the accident? A. After the accident.

Q. Yes.

A. I think it was along the latter part of March or the first of April.

Q. Of this year. A. Yes sir.

Q. How does the business progress?

A. It is and has been fine.

Q. Up to your expectation, you are making as much as you did before.

A. I could have made more at Christmas.

Q. But you were incapacitated at that time.

A. Yes, I was laid up.

Q. Since you resumed your occupation you have been able to follow it as you did before. [81]

A. Yes, I have been selling.

Q. Your age is now fifty-seven.

A. I was fifty-six at that time.

Q. At the time of the accident.

(Testimony of Mary Lydia Lamberson.)

A. Yes sir.

Q. Would you mind stating whether you had passed through the menopause before the accident?

A. I don't know whether I know just what you mean.

Q. Had you experienced the change of life?

A. I had passed through it.

Mr. McCutcheon: That is all.

Redirect Examination

By Mr. Bowen:

Q. At the time you fell in the entrance way of that store was there any rubber matting on top of the tile? A. There was no matting.

Mr. McCutcheon: That is objected to as being wholly immaterial. It has not been shown that there was any want of ordinary care. I doubt that any rubber matting would be required under the law that applies to this case.

The Court: Overruled.

A. There was no matting of any kind, just plain tile.

Q. State the fact as to whether or not the top surface of the tile in the entrance way was smooth or how was it.

A. It was smooth I believe. I didn't do much examining, [82] I was too sick for that.

Q. Counsel has asked regarding the water that your face was bathed with, or that may have been applied to your face after your accident, or after

(Testimony of Mary Lydia Lamberson.)

you were injured. How much water, if you know, was applied to your face?

A. I don't know whether there was any applied to my face. I think they were rubbing it on my arm.

Q. Where was the water on your coat?

A. Right down the right side as I went down.

Q. The right side. A. Yes sir.

Q. From your waist down, was that where it was wet? A. Yes sir.

Q. When was it that you observed that the water was on your stocking and coat?

A. Just as I raised up when the lady helped me up in the shoe department.

Q. How soon was that with reference to when the accident occurred? How long was it after the accident?

A. It was close to ten minutes I would judge.

Q. About ten minutes after the accident.

A. Yes sir.

Q. Was the water on your coat and stockings before you fell? A. No sir.

Q. It was after you fell that you observed the water? [83]

A. Yes sir, it was after I fell that the water was there.

Mr. Bowen: That is all, thank you.

Recross Examination

By Mr. McCutcheon:

Q. What kind of shoes did you wear on that day?

(Testimony of Mary Lydia Lamberson.)

A. I wore Red Cross shoes, just like I have today.

The Court: May I see your shoes?

A. Yes sir.

The Court: Rubber heels.

A. Yes sir.

Q. You didn't have rubbers on that day?

A. I didn't need rubbers.

Q. About how high is that heel?

A. I would say about an eighth of an inch.

Q. I mean the whole heel, not the rubber portion, the entire heel, the rubber and the other portion.

A. It is a Cuban heel.

Q. About one and a half inches, it appears that way to me.

A. Maybe not quite that high, no not quite.

Mr. McCutcheon: Is there a ruler handy Mr. Bailiff.

(Whereupon the bailiff procured a ruler and the heel on witness's shoe was measured)

A. It is just an inch and a half in the front of the heel.

Mr. McCutcheon: It is a rubber heel, that [84] is, the lift is rubber. I think that is all of this witness.

Redirect Examination

By Mr. Bowen:

Mr. Bowen: I think we should show the width of the heel in order that the whole matter may be in the record.

(Testimony of Mary Lydia Lamberson.)

Mr. Anderson: (Measuring the heel) It is about an inch and a half wide, across the front.

Mr. Bowen: That is all.

CHESTER A. LAMBERSON

being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Are you the husband of the lady who just testified? A. Yes sir.

Q. Will you state your name for the record?

A. Chester A. Lamberson.

Q. And you are one of the plaintiffs named here? A. Yes sir.

Q. Where are you living at this time?

A. 500 L Street, Idaho Falls, Idaho.

Q. Are you employed in any business or occupation? [85] A. Yes sir.

Q. What do you do?

A. Collector for the East Side Lumber Company.

Q. How long have you been so employed?

A. Since the first of June.

Q. Directing your attention to the 26th of November 1941, where were you living at that time.

A. 500 L Street, Idaho Falls, Idaho.

(Testimony of Chester A. Lamberson.)

Q. The same place. A. Yes sir.

Q. How long had you been living there at that time? A. Since 1940.

Q. Do you recall the occasion of Mrs. Lamberson being injured in November 1941?

A. Yes sir.

Q. Just tell us when you first knew about that?

A. It was on the 26th of November, somewhere around three or four in the afternoon.

Q. How were you notified?

A. I was over with Dave Sweeney in the real estate business, I was out and the stenographer got a telephone call, and she told me when I came in to come to the Doctor's office?

Q. What Doctor? A. Doctor Soderquist.

Q. And did you go to the Doctor's office when you got the message, on that date? [86]

A. Yes sir.

Q. Did you see Mrs. Lamberson there?

A. Yes sir, in the Doctor's office.

Q. What did you observe?

A. She said "look Dad what I have done". I saw her arm was broke, she was pale and in pain. The Doctor said to come in the X-ray room and I went in and saw the picture of the break.

Q. Can you tell the Court what you saw?

Mr. McCutcheon: Objected to as it would not be the best evidence. No foundation has been laid.

The Court: I think it may be admitted for what it is worth. He may answer.

A. He took two pictures, one laying like that

(Testimony of Chester A. Lamberson.)

and the other this way. You could see the crack. It looked like a piece of bone broke off the side, which there was, you could see and the Doctor said there was.

The Court: Do you have the X-ray.

Mr. Anderson: I am afraid we won't have these particular ones.

Mr. McCutcheon: I move to strike what the Doctor says from the answer because——

Mr. Bowen: ——yes I think that should go out.

The Court: That will be stricken. [87]

Q. After being in the Xray room what occurred?

A. I looked at the picture and went into the office with the Doctor and proceeded to get ready to set her arm. He got the splint or cast ready and on her arm and then he pulled her arm and I helped hold her arm and the nurse helped.

Q. Did Mrs. Lamberson make any complaint of pain during that process?

A. I would say she did.

Q. Did you observe her during that time?

A. Yes sir.

Q. What did you observe as to her physical features?

A. She looked like she was in quite a little agony and pain.

Q. Did you look at her wrist and arm at that time? A. Yes sir.

Q. Describe the appearance of her right wrist and arm at that time.

(Testimony of Chester A. Lamberson.)

A. It looked like it was broke off, and set off to the side.

Q. Was there any swelling on the wrist?

A. Yes sir, quite bad. It looked like the bone was about to push through.

Q. What was done when the cast was put on the arm?

A. We sat around and talked a little while when he got her fixed up.

Q. And did you take Mrs. Lamberson home?

A. Yes sir, I took her home in the car. [88]

Q. How did you take her home?

A. I took her home in the car. We walked to the car. I took her home and she stayed there.

Q. Did you assist your wife to walk to the car?

A. Yes, I held her arm.

Q. Did you notice any water or moisture on any portion of your wife's clothing?

A. I noticed her stocking was wet and stained.

Q. Did you notice which stocking it was?

A. The right side.

Q. What time did you arrive home, in your judgment what time was it?

A. I would say a little after four o'clock. I know that it was between three and four that I got the call to come over.

Q. Over to the Doctor's office.

A. Yes sir.

Q. What did Mrs. Lamberson do when you got home?

(Testimony of Chester A. Lamberson.)

A. I took her coat off and she went and laid down.

Q. Did you live at home following that accident? A. Yes sir.

Q. Was Mrs. Lamberson able to do her housework? A. No sir.

Q. Who did the housework?

A. Pa did the work.

Q. You mean that you did it?

A. Yes sir. [89]

Q. How long did you perform the housework after that time?

A. I should judge better than three months. I am still doing some of it.

Q. During that time did Mrs. Lamberson complain of pain in her wrist? A. Yes sir.

Q. How often did she make complaint?

A. Sometimes it would be three or four times in a day.

Q. Up to the present time?

A. Yes sir.

Q. At this time does Mrs. Lamberson make complaint of pain in her right wrist and arm?

A. Yes sir.

Q. What is the fact as to whether or not prior to the time that your wife was injured, that she looked after housework?

A. I didn't get that.

Q. What is the fact as to whether or not prior to the time your wife was injured, that she looked after her housework and performed her work.

(Testimony of Chester A. Lamberson.)

A. She did all of it.

Q. Did she ever complain of pain or injury in her right arm or wrist before that date?

A. No sir.

Q. Since her injury have you observed any difference in her ability to perform her housework, than before that time? A. Yes sir. [90]

Q. Tell the Court what you have observed?

A. Well, in using her arm in lifting, cutting, peeling vegetables or anything like that, she can't do it at all.

Q. Which arm? A. The right one.

Q. Directing your attention to the time in Doctor Soderquist's office when the cast was being applied, did anyone else come in Doctor Soderquist's office at that time?

A. Yes sir, Doctor Cline.

Q. You say Doctor Cline came in.

A. Yes, Doctor Cline came in and Doctor Soderquist said "is it all right" and Doctor Cline said "yes it is".

Q. Do you know what they were talking about when he said "is it all right"?

A. I suppose they were talking about the arm.

Q. Do you know,—did Doctor Soderquist make a charge for his services to your wife?

A. Yes sir.

Q. Do you know the amount of that charge?

A. I think it was forty dollars, it might have been forty-five or thirty-seven, I don't just remember but we have a statement of it.

(Testimony of Chester A. Lamberson.)

Q. Have you ever received a bill from Doctor Cline?

A. Yes sir, I kept getting one for \$5.00 but I don't know what it is for.

Q. Mr. Lamberson, I show you what has been marked for identif- [91] ication as plaintiff's exhibit one, will you examine it,—you have exhibits 1, 2, and 3 will you state what they are, if you know.

A. Statements from Doctor Cline for \$5.00.

Q. They were sent to you, were they?

A. Yes sir.

Mr. Bowen: We will ask that they be admitted in evidence.

Mr. McCutcheon: May I ask the witness a question or two.

The Court: Yes, you may.

By Mr. McCutcheon:

Q. Have you one or two brothers in Idaho Falls? A. One.

Q. What are his initials? A. C. E.

Q. Where did he live in December 1941?

A. On K street.

Q. Where was your residence then?

A. In 1941.

Q. Yes.

A. L street, we moved from 660 G street over to L street.

Mr. Bowen: We have offered exhibits 1, 2, 3 and 3A.

Mr. McCutcheon: We object that it is not [92]

(Testimony of Chester A. Lamberson.)

material, no proper foundation is laid and there is no pleading to support this element. The only charge in the complaint is the \$45.00 which it is alleged that Doctor Soderquist charged. The statements are not addressed to the residential address of this plaintiff at that time. The address seemed to be some house on J. street.

The Court: I assume counsel may have some purpose in offering these. The objection is overruled. They may be admitted.

PLAINTIFF'S EXHIBIT No. 1

Statement

Dr. C. M. Cline

First Security Bank Building

Telephone 88

Idaho Falls, Idaho, Jun 30 1942.

C. A. Lambertson

J St.

City

To professional services:

5.00

[Endorsed]: Filed Oct. 15, 1942.

PLAINTIFF'S EXHIBIT No. 2

Statement

Dr. C. M. Cline

First Security Bank Building

Telephone 88

Idaho Falls, Idaho Dec 29 1941.

(Testimony of Chester A. Lamberson.)

C. A. Lamberson

J St.

City

To professional services: 5.00

[Endorsed]: Filed Oct. 15, 1942.

PLAINTIFF'S EXHIBIT No. 3

Statement

Dr. C. M. Cline

First Security Bank Building

Telephone 88

Idaho Falls, Idaho May 30 1942.

C. A. Lamberson

J St.

City

To professional services: 5.00

(Envelope attached.)

[Endorsed]: Filed Oct. 15, 1942. [154-a]

By Mr. Bowen:

Q. Has Doctor Cline ever performed any other service for you, other than on the date that your wife was injured? A. Never.

Q. Did you ever employ him to perform any other service? A. No sir.

Q. You have never employed him.

A. No sir.

(Testimony of Chester A. Lamberson.)

Mr. Bowen: That is all, you may take the witness.

Cross Examination

By Mr. McCutcheon:

Q. Did Doctor Cline take the pictures?

A. No sir.

Q. Doctor Soderquist took the pictures?

A. His nurse took them. [93]

Q. Beyond stepping in to Doctor Soderquist's office at the time as you have testified, Doctor Cline performed no service for you.

A. No sir.

Q. Is it possible that this bill could be charged against your brother C E is it.

A. No it is not possible. He didn't live on G. street and his initials are C C.

Q. Yours are C A. A. Yes sir.

Q. Could it be that the bill is against him?

A. It could be possible, but I don't think he ever had Doctor Cline.

Q. Was there an anesthetic administered at the time your wife's arm was set? A. No sir.

Q. How far is it from Doctor Soderquist's office to where the car was parked that day?

A. It is two blocks or better.

Q. You didn't have a taxi take you to your car, you walked up the street, did you?

A. That's right, we walked.

Mr. McCutcheon: That is all.

(Testimony of Chester A. Lamberson.)

Redirect Examination

By Mr. Bowen: [94]

Q. Please explain to the Court, if you know, the office arrangement of Doctor Cline and Doctor Soderquist.

A. You come up from the north and turn and go into a hall door into the waiting room, the Xray room is here, Cline's office here and Doctor Soderquist's office here (indicating).

Q. Do both Doctors have the same waiting room?

A. Yes sir.

Q. Do their office join, just a partition between them?

A. Yes sir, I think they do.

Mr. Bowen: That is all, thank you.

Mr. McCutcheon: That's all.

ETHEL CRIDDLE

being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Will you please state your name?

A. Ethel Criddle.

Q. Where do you live?

A. 204 6th street.

Q. What city and State?

A. Idaho Falls, Idaho.

(Testimony of Ethel Criddle.)

Q. How long have you lived there?

A. Since 1924. [95]

A. Are you living there at this time?

A. Yes sir.

Q. Are you acquainted with Mrs. Lamberson?

A. Yes I am.

Q. Are you some relation to her?

A. Well, my father is her grandfather's nephew.

Q. Where were you living on November 26, 1941.

A. At Idaho Falls.

Q. What was the address in Idaho Falls?

A. 204 6th Street, Idaho Falls.

Q. Do you recall the occasion of Mrs. Lamberson being injured? A. Yes sir.

Q. Where were you on that day,—strike that—when did you hear about Mrs. Lamberson being hurt?

A. It was sometime around four o'clock.

Q. That same day.

A. Yes, four o'clock the same day.

Q. Had you yourself been up town in Idaho Falls, on that day? A. Yes sir.

Q. Did you have occasion, or did you go to the Montgomery Ward Company store that day?

A. Yes sir.

Q. Were you alone?

A. No sir, I was with Mrs. Theuson.

Q. Do you recall about what time you went to the Montgomery [96] Ward Company store that day?

(Testimony of Ethel Criddle.)

A. It must have been somewhere between 3:30 and 4 o'clock in the afternoon.

Q. From what street did you enter Montgomery Ward store that day Mrs. Criddle?

A. Shupe Avenue.

Q. Do you know how many entrance-ways there are to Montgomery Ward Company store from Shupe Avenue? A. Four entrances now.

Q. Did you know why Mrs. Theusen was going there?

A. Yes, she was my neighbor and I met her down town on the opposite corner from Montgomery Ward by the Cutter hotel and she asked me to walk to L street with her and I said it was rather late and she said that if I would walk over we could get Glenn to come for me, that is my son. She said, "I have to go to Montgomery Ward to change this article", and I went with her.

Q. Do you recall anything happening just before you entered Montgomery Ward Company store?

A. Well, we noticed a man sweeping water out of the doorway.

Q. Did you later enter the store?

A. Yes sir.

Q. Tell the Court what you did after you went into the store that time?

Q. We both went to the store and Mrs. Theusen took her article [97] to the same department to have it exchanged and I stayed in the front part of the store.

(Testimony of Ethel Criddle.)

Q. Do you know how long you stayed there before you left?

A. It wasn't very many minutes.

Q. Did you and Mrs. Theusen leave together?

A. Yes sir.

Q. What did you do then?

A. We walked out on B street and went over to Park. She suggested that we write a note to my son and put it in the car. We didn't know where he was but we knew where the car was so we wrote that we have gone over to Mrs. Theusen's on L street, and we wanted him to come down there. We went to L. street and when we got about a block from Mrs. Lamberson's home I said; "I have a friend living on L street", I said; "they are the Lambersons do you know them", and she said she thought it was on the corner. Just about that time we met Chester and he said; "what are you doing over in this part of town" and I said "I am going to see you, I have been asked to see that new home and I am going to see it now". He said; "I have just taken Lydia home with a broken arm", and I said; "how did that happen", and he said——

Mr. Bowen: What did you do Mrs. Criddle.

A. I went down and I rang the door bell and it was quite a while before anyone came to the door, I guess she was [98] lying down. I said to Mrs. Theusen, you are going to meet one lady in your neighborhood and I introduced her to Mrs. Lamberson, and I said to Mrs. Lamberson, "how in

(Testimony of Ethel Criddle.)

the world did you break your arm'' and she said that she fell at Montgomery Ward's store in some water by the door, and I said that I saw a man sweeping out the water there.

Mr. McCutcheon: I have let her go on and re-cite all this conversation without any proper foundation being laid down, I will have to object to any more of this conversation.

The Court: Yes, sustained.

Q. Was Mrs. Lamberson's arm in a cast at that time? A. Yes sir.

Q. How long had you known Mrs. Lamberson prior to that time? A. Since 1903.

Q. State what, if anything, you observed as to her physical condition on that date. The date about which you are relating now.

A. She looked very pale and seemed to be in quite a bit of misery with her arm.

Mr. Bowen: You may cross examine.

The Court: We will recess for ten minutes.

11:30 A.M. October 15th, 1942

Cross Examination

By Mr. McCutcheon: [99]

Q. Was Charles Criddle your former husband?

A. Yes sir.

Mr. McCutcheon: That's all.

ELAINE MERRILL

being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. State your name to the Court, please.

A. Elaine Merrill.

Q. Where is your home at this time?

A. 660 Lomax, Idaho Falls, Idaho.

Q. How long have you lived in Idaho Falls?

A. Since 1937.

Q. Directing your attention to the day that Mrs. Lamberson was injured, where were you at that time?

A. I was employed at Montgomery Ward's in the mens clothing department.

Q. At what City and State?

A. Idaho Falls, Idaho.

Q. Do you recall seeing Mrs. Lamberson there at that time?

A. I was back in the mens shirt department when I saw Mrs. Lamberson assisted by Mr. Peterson and Mr. Miller. When I first saw her they were getting a stool out of the aisle [100] for her to sit on.

Q. Did you go to where she was?

A. I did. She was very faint. She was about to collapse. I fanned her and then I went to the ladies room to get a glass of water. She drank part of the water and I massaged her brow with

(Testimony of Elaine Merrill.)

a damp cloth to bring her out of the faint. I got the glass in the dressing room.

Q. Where was she?

A. She was sitting on the stool when I left, and when I got back she was on the stool and Mr. Miller and Peterson were assisting her.

Q. Was she on the stool when you last saw her?

A. No, not when I last saw her. She was on the stool and I massaged her brow, and her wrist was swollen and we wrapped it as tight as we could get a bandage around it. It was swollen badly.

Q. What hand was that.

A. It was the right wrist.

Q. How long was she in the store before she left?

A. About ten or fifteen minutes from the time I saw her first until she was in the taxi.

Q. Did she leave the store alone?

A. She was accompanied by Mr. Peterson. I assisted her to the back door and he left with her.

Q. During the time Mr. Lamberson was there in the shoe department [101] did you observe anything on any part of her clothing?

A. Not on the stool. We asked her what Doctor she would like to go to and she said Doctor Soderquist and I called him and asked him if he would come to the store and he said "no" to bring her to the office. When I was at the telephone they took her to the shoe department and she was lying on the floor in the shoe department.

Q. Did you observe anything on her clothing?

(Testimony of Elaine Merrill.)

A. She went to get on a chair and I noticed part of her clothing being wet. I don't remember which part of her clothing it was, but it was from the waist down. I think it may be her coat.

Q. Was that very wet?

Mr. McCutcheon: I object to that as leading.

The Court: She may answer.

A. She drank the water I gave her, but we used a little bit on her wrist and she drank the rest of it.

Q. Did you spill any water on her clothing?

A. No sir, there wasn't any left to spill.

Q. Are you employed by Montgomery Ward and Company at this time?

A. No sir, I am not.

Q. When was the last time you worked for them?

A. It was the 16th of September,—no—it was the following Saturday after the 16th.

Q. After the 16th of September. [102]

A. Yes sir.

Q. What was the reason for leaving the employ of Montgomery Ward and Company?

Mr. McCutcheon Objected to as immaterial.

The Court: Sustained.

Q. How long had you been employed by Montgomery Ward and Company prior to this occasion?

A. I was,—I started in October 1937. I didn't work all of the time, I have a family so was not able to work all of the time.

(Testimony of Elaine Merrill.)

Mr. Bowen: That is all, thank you, you may take the witness.

Cross Examination

By Mr. McCutcheon:

Q. You say that you called Doctor Soderquist.

A. Yes sir.

Q. Where did you have to go from where Mrs. Lamberson was at that time to go to the telephone?

A. I believe I went to the mail order desk. I am not sure where I went to call.

Q. There are telephones on the first floor?

A. Yes sir.

Q. This all occurred on the first floor?

A. I don't remember where I called from. There is a telephone in the infants department, but I don't remember whether I [103] called from there or not. Our mail order department was on the main floor then. I just don't remember.

Q. Was that after you got the water?

A. Yes sir.

Q. Where was the rest room from the place Mrs. Lamberson was?

A. It is on the furniture floor.

Q. That is the third floor? A. Yes sir.

Q. How long were you gone to get the water?

A. Maybe three or four minutes, I was excited and ran.

The Court: Just a moment, let me ask is there an elevator?

A. No sir.

The Court: You may proceed.

(Testimony of Elaine Merrill.)

Q. Did you have any conversation with Mrs. Lamberson at the time you were with her, or during any of the time you were with her?

A. No sir. When she asked for water we were trying to soothe her, she was sick. She was very pale.

Q. When you left was she sitting up?

A. When I went to call the Doctor she was sitting on a stool.

Q. Did you see her at any time lying on the floor?

A. When I came back from calling the Doctor she was lying on the floor. I assisted them in helping her into a chair in the shoe department. [104]

Q. Was she lying on the floor when you went for the water?

A. No sir, she was sitting on the stool.

Q. You helped Mr. Peterson take her to the Taxi cab. A. Yes sir.

Q. Where did the Taxi cab come to, at the store?

A. At the back door of the store.

Q. On the first floor?

A. Yes sir, in the alley.

Mr. McCutcheon: That is all.

Redirect Examination

By Mr. Bowen:

Q. Did Montgomery Ward and Company occupy all of the first floor at that time? A. Yes sir.

Mr. Bowen: That is all, thank you Mrs. Merrill.

Mr. McCutcheon: That's all.

MARY LYDIA LAMBERSON

Being recalled as a witness for the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Mrs. Lamberson, directing your attention to the time you fell, what is the fact as to whether there was sand or ashes on the entrance-way where you fell, at the time you fell? [105]

A. There wasn't any.

Q. Before leaving the store on that occasion did anyone warn you regarding the entrance-way being slippery or wet?

A. No sir, they didn't.

Mr. Bowen: That is all.

Mr. McCutcheon: No questions.

The Court: We will recess until 1:30.

1:30 P. M., October 15, 1942

LYDIA WEBB THUESSEN

Being called as a witness for the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Will you please state your name to the Court?

A. Lydia Webb Thuesen.

Q. Where is your home?

A. Idaho Falls.

Q. The address.

A. 588 L and Sage.

Q. How long have you lived there?

(Testimony of Lydia Webb Thuesen.)

A. About a year and a half.

Q. Are you acquainted with Mrs. Lamberson?

A. I have been since November.

Q. Last November. A. Yes sir. [106]

Q. Directing your attention to the month of November 1941, I will ask you if you recall the occasion of Mrs. Lamberson being injured?

A. Yes sir.

Q. Were you downtown in the City of Idaho Falls that day? A. Yes sir.

Q. Did you meet a Mrs. Criddle that day, downtown? A. Yes sir.

Q. Where did you meet her?

A. On the corner of B and Shupe.

Q. Where would that be from the Montgomery Ward Company store in Idaho Falls?

A. Across the street, south.

Q. Did you go any place with Mrs. Criddle?

A. I got her to go with me.

Q. What was that Mrs. Thuesen?

A. I asked her to go with me.

Q. Tell us what you did then?

A. I had just come from Nampa. One of my daughters had sent my other daughter's son a sweater coat and she wanted me to take it back and get a refund, and I was doing that.

Q. Did you go to Montgomery Ward's store?

A. Yes sir.

Q. What entrance did you use in going in the store? A. The men's department. [107]

(Testimony of Lydia Webb Thuesen.)

Q. Do you know how many entrances there are on Shupe Avenue. A. Four.

Q. And which entrance is the mens department.

A. The third.

Q. Do you recall anything happening as you walked up to go in the store at that entrance?

A. Quite a bit of water at the door and a man sweeping there.

Q. How was the weather there that time,—on that day, do you recall the condition of the weather?

A. The weather was fine as we sauntered home.

Q. You were walking? A. Yes sir.

Q. What did you do after you walked into the store?

A. I left Mrs. Criddle in the front of the store while I went on to do the business of returning the sweater.

Q. Did you leave by the same entrance that you came in to the store? A. Yes sir.

Q. Did you observe when you came out whether there was any water in the entrance-way at that time?

Mr. McCutcheon: Objected to as the proper foundation for the admission of this testimony has not been laid. As far as time goes, it might have been after the event which is the subject matter of this suit.

Mr. Bowen: I will be glad to fix the time. [108]

Q. What time of day was it that you went into the store?

(Testimony of Lydia Webb Thuesen.)

A. Between three and four o'clock.

Q. In the afternoon. A. Yes sir.

Q. How long did you remain in the store, in your best judgment?

A. Ten or fifteen minutes.

Q. And then you left the store?

A. Yes sir.

Q. Was there any water in the entrance-way when you walked out? A. I don't recall any.

Mr. McCutcheon: We make the same objection.

The Court: Overruled.

Q. What is the fact as to whether or not you did see some water in the entrance-way as you went in? A. What was that question?

Q. I asked what the fact was as to whether you saw water in the entrance-way when you went in the store. Did you see any water in the entrance-way as you went in?

A. We had to kind of stop on account of a man sweeping there.

Q. After coming out of the store what did you do?

A. We went to B street and down to Park Avenue and back of Carl and John's where Mrs. Cridle's boy had his car parked and we left a note for him to come and get us.

Q. What did you do after that?

A. Walked across Park Avenue kitty-cornered across the Riverside lawn. [109]

Q. Did you go to Mrs. Lamberson's home?

A. Yes sir.

(Testimony of Lydia Webb Thuesen.)

Q. Did you see anyone?

A. She told me she wanted to go and see Mrs. Lamberson's home and I pointed it out to her. We saw Mr. Lamberson coming toward us, and by that time he had gotten to us.

Q. Did you say anything to him?

A. She said she wanted to see his new home. He said he had just taken his wife home with a broken wrist.

Q. Did you go to the Lamberson home?

A. Yes sir.

Q. What did you do then,—strike that please,—did you see Mrs. Lamberson? A. Yes sir.

Q. Describe her appearance.

A. She came to the door after a few minutes, and she was rubbing her arm. It was in quite a bit of pain and she said——

Q. ——which arm was that?

A. Her right arm.

Q. Did it have a cast on? A. Yes sir.

Mr. Bowen: You may examine.

Cross Examination

By Mr. McCutcheon: [110]

Q. What time was that, can you tell?

A. Around four o'clock or probably a little after.

Q. And you cannot fix the time that you entered the store any more definitely than to say that you entered it between three and four.

A. No, I cannot.

Q. How long would it take you to walk over

(Testimony of Lydia Webb Thuesen.)

from the parking place where the Criddle car was parked to the Lamberson house?

A. About twenty-five minutes.

Q. It took both of you about that time?

A. Yes, all of that.

Q. Had you traded at Ward's store?

A. Frequently.

Q. You had traded there? A. Yes sir.

Q. You had not met Mrs. Lamberson before this day. A. No sir.

Q. How long have you lived in Idaho Falls?

A. Eight years.

Q. Up until now. A. Last January.

Q. When you and Mrs. Criddle went into the store did you have any difficulty in getting in?

A. We had to kind of stop so as not to get the water splashed on us. [111]

Q. Can you fix the time it was exactly?

A. No sir, I can't.

Q. Can you tell whether it was before or after Mrs. Lamberson fell? A. Yes sir, it was after.

Q. It was after. A. Yes sir.

Mr. McCutcheon: I would ask the Court to strike the testimony of this witness and Mrs. Criddle concerning the condition prevailing at the time they went into the store because it was subsequent to the event described in the pleadings.

The Court: What have you to say.

Mr. Anderson: Our contention is that they put this water on this entrance; that the defendant or some of its employees did because Mrs. Lamberson

(Testimony of Lydia Webb Thuesen.)

testified that when she went in there wasn't any water and when she came out the water was there and she fell, and closely connected with it, these ladies went in. Our theory is this, and we think there is sufficient evidence to show that they put this water in this entrance-way, and after she had fallen and when these ladies went in they were sweeping it up. It is all closely connected, and we feel that to deny us of this would be to deny us of some material evidence.

The Court: The motion is denied.

Mr. McCutcheon: May we have an exception.

The Court: Certainly. [112]

Q. Were you here this morning when Mrs. Lamberson testified? A. Yes sir.

Q. You heard her testify that she noticed a pool of water in the entrance as she came out of the store?

A. I wouldn't say whether she did or not.

Q. When you went in what was the condition of the entrance?

A. Quite a bit of water on there.

Q. Over the whole area.

A. Right in front of the door was all.

Q. And how deep was it?

A. Not very deep I don't think.

Q. There was someone sweeping it out you say?

A. Yes sir.

Q. Can you say whether that was before or after Mrs. Lamberson fell?

(Testimony of Lydia Webb Thuesen.)

A. It was after, according to the time she was there.

Mr. McCutcheon: That is all.

Mr. Bowen: That is all. The plaintiff rests.

Mr. McCutcheon: Our first witness is Doctor C. M. Cline, it would be out of order but counsel do not object. I will use him now so that he may be excused.

The Court: Very well.

DOCTOR C. M. CLINE

Being called as a witness for the defendant, after being first duly sworn, testifies as follows: [113]

Direct Examination

By Mr. McCutcheon:

Q. State your name?

A. Clifford M. Cline.

Q. Where do you reside?

A. Idaho Falls, Idaho.

Q. How long have you resided there?

A. With the exception of about one year, since 1907.

Q. And what is your profession?

A. Surgeon.

Q. Were you engaged in that practice in Idaho Falls in June of 1942? A. I was.

Q. And with the exception of one year you have practiced continuously since 1907?

A. Yes, in Idaho Falls.

(Testimony of Doctor C. M. Cline.)

Q. Where did you receive your education?

A. Northwestern.

Mr. Bowen: We will admit his qualifications.

Mr. McCutcheon: I think I would rather inquire.

Q. Did you graduate? A. Yes sir.

Q. And what internship did you serve.

A. Eighteen months on graduation. [114]

Q. Where?

A. At the Cosmopolitan Clinic.

Q. How extensive has been your practice since you started to practice in Idaho Falls, during your residence there?

A. I have been reasonably busy, I think.

Q. Are you licensed to practice in this State?

A. Yes sir.

Q. A member of the American College of Surgeons? A. I am.

Q. Now, Doctor, calling your attention to the date of June 1942,—June the 24th, 1942, did you have occasion to examine Mrs. Lydia Lamberson?

A. I did.

Q. And did you make such an examination?

A. I did.

Q. For the purpose of refreshing your memory I will hand you memoranda which you gave me at that time relative to the examination. What did you find on your examination of Mrs. Lamberson?

Mr. Anderson: We object to this witness testifying to any finding in connection with the fractured wrist, for the reason and upon the ground

(Testimony of Doctor C. M. Cline.)

that it appears that he was consulted at the time of setting the same and for which he made a charge of \$5.00. As the record stands now, at any rate, he was consulted and that his evidence [115] with respect thereto is privileged under the Idaho Statute, and we object on that ground.

Mr. McCutcheon: If I may inquire a question or two further I think I can clear that up.

The Court: Go ahead.

Q. Doctor Cline, did Mrs. Lamberson consult with you ever before this time, and particularly on November 26, 1941, relative to a fracture?

A. She did not.

Q. Did you ever render any professional service to her in that connection?

A. My X-ray laboratory did.

Q. That X-ray machine is your property?

A. It is my private property.

Q. Does Doctor Soderquist have the privilege of using it? A. The full use of it.

Q. On what basis?

A. The charge is turned to my secretary and charged to his patient.

Q. Now, here are some papers marked exhibits 1, 2 and 3, for the plaintiff in this case. I will ask you to examine them. A. Yes sir.

Q. Can you tell what they are.

A. They are statements, the only thing I would know about these would be that it is the usual X-ray charge for cases of this type. [116]

(Testimony of Doctor C. M. Cline.)

Q. Did you ever make any charge for professional services to Mrs. Lamberson?

A. I did not.

Mr. McCutcheon: Now with that I think this is admissible. This examination of the plaintiff was made,—I forget whether it was on stipulation or on Order of Judge Cavanah that she submitted to the examination, but I think she went voluntarily to Doctor Cline in June.

Mr. Anderson: I would like to ask the Doctor a question.

The Court: You may ask.

By Mr. Anderson:

Q. You did go into the room where Mrs. Lamberson was at the time this arm was set and looked at the cast and the arm at Doctor Soderquist's request.

A. I may have and I may not. I don't remember.

Mr. Anderson: We object on the same ground.

The Court: Overruled.

Mr. Anderson: May we have an exception if it is answered.

The Court: You may.

Q. When you examined Mrs. Lamberson on the 24th of June 1942 please state what you found relative to Mrs. Lamberson's physical condition. [117]

A. She gave me a history on November 26, of slipping and falling at the entrance of the Montgomery Ward Store, and that she had injured her right arm back at that time. A fracture of the distal end of the radius, the styloid process. We x-

(Testimony of Doctor C. M. Cline.)

rayed this arm at that time and found the position excellent. She said also that her back was strained but now recovered. She has some swelling in that wrist joint, some limitation of motion also unable to completely flex the fingers. Some deformity at the wrist. Was nervous for three months after the injury. Tonsils out; teeth bad; throat negative; heart negative; blood 120 over 80; reflexes negative; back normal; some arthritic changes in the hands and wrist joints in both hands. Urinalysis made.

Q. Doctor, have you seen her since that time?

A. No I haven't.

Mr. McCutcheon: Would it be permissible for the Doctor to look at her arm now?

Mr. Anderson: We are perfectly willing to have Doctor Cline examine here in Court here, but we do not waive the objection we formerly made.

The Court: Very well.

Q. Doctor will you look at her arm and wrist.

A. You mean examine her arm now.

Q. Yes.

A. I would say that this is a little difficult to remember, but I would say that the deformity is the same as it was; [118] that the swelling is less; that she has more motion in the fingers than she had at the last examination; that the evidence of arthritic changes are about the same.

Q. Arthritic changes would not be the result of the fracture?

A. I think not. After an injury arthritic

(Testimony of Doctor C. M. Cline.)

changes are sometimes more noticeable than otherwise. Arthritis can originate without any injury.

Q. Would not pyorrhea have a tendency to create arthritic changes?

A. It is one of the many causes.

Q. What result was obtained in reducing the fracture.

A. The position of the bones is excellent. The fracture shows very good apposition.

Q. What flexibility is in the wrist and fingers?

A. About seventy-five per cent. The fingers are better than that.

Q. She has given her age as fifty-seven, now, Doctor, considering the arthritic condition, do you think that any immobility or lack of mobility would be the result of arthritis?

A. Age isn't always a factor, but arthritis is.

Q. Would you say that her arthritic condition has anything to do with the lack of mobility in the wrist and fingers?

A. Yes.

Q. Would you say if she didn't have arthritis that she would have full mobility in her wrist and fingers?

Mr. Anderson: Objected to as calling for a conclusion. [119]

The Court: He may answer. Overruled.

A. I cannot answer that positively. I think arthritis is a definite factor.

Mr. McCutcheon: That is all.

(Testimony of Doctor C. M. Cline.)

Cross Examination

By Mr. Bowen:

Q. Did this fracture invade the wrist joint?

A. No. When we talk about the wrist joint we talk about the bones in the joint.

Q. What I had in mind, Doctor, was, how close to the end of the radius where it joins the wrist bone was the fracture? A. Very close.

Q. Is it quite possible that the fracture did injure the wrist joint?

A. There is no evidence of damage to the wrist bones.

Q. Isn't it true that frequently where you have a fracture so close to the joint that a thickening of the synovial membrane causes stiffness of the joint? A. Very often.

Q. Could that happen in this instance.

A. This is an arthritic type and not a fracture type.

Q. What is the fact, based upon your experience, whether a fracture of that type is painful or not? A. Very painful.

Q. Do you have as complete a recovery in a person fifty-six years of age, in a fracture of this kind as you would in a younger person? [120]

A. Age is a very peculiar thing. Sometimes people of sixty-five recover better than a person of twenty-five. On an average, however, I would say no.

Q. In a case of this kind in a person of Mrs.

(Testimony of Doctor C. M. Cline.)

Lamberson's age, what is the fact as to whether atrophy occurs and muscles never come back to their normal condition?

A. Age is not always a factor, as I have said before.

Q. Arthritis is caused from a legion of causes, isn't it, Doctor Cline?

A. Usually from some type of potent infection. Some types we cannot determine the cause.

Q. This condition existing in Mrs. Lamberson's wrist, isn't it possible that this injury led to all this trouble?

A. I would say that if she had prior arthritis, that this injury might create a more severe condition.

Q. Is it true that one could have a fracture and an arthritic condition follow that they had never had before?

A. Yes, I think that is pretty far-fetched, but I think anything could happen and be true in connection with a fracture.

Q. If Mrs. Lamberson never had any pain or suffering from pain until after this fracture, isn't it your opinion that the fracture would be the inciting cause of her pain?

A. Yes. I questioned her however, and she did give some prior history of arthritis.

Q. Did she tell you what portion of her body she had pain in? [121]

A. Mostly in her hands.

Q. Is arthritis ever caused from hard work?

(Testimony of Doctor C. M. Cline.)

A. Not that I ever heard of.

Q. Isn't it true that you frequently have people tell you that they don't feel good until they get warmed up and then their pain leaves?

A. Yes, but that is not arthritis.

Q. What kind of a disease is that?

A. Arthritis is definitely a disease of the joints.

Q. Thickening of the joint; of membrane would cause pain and cause loss of mobility?

A. Yes, sir.

Q. Does that examination which you made show that she gave a history of arthritis?

A. Continuous pain, or continues to have pain in the right upper and some arthritic changes in the bones of the hands.

Q. Nothing that she told your about arthritis?

A. Yes, that is a question of my memory.

Mr. Bowen: I think that's all.

Redirect Examination

By Mr. McCutcheon:

Q. Doctor, you are now examining defendant's exhibit 4, I will ask you to state what it is?

A. X-ray picture taken of Mrs. Lamberson by my X-ray technician.

Q. When was that taken? [122]

A. June 24, 1942.

Mr. McCutcheon: We offer it in evidence.

Mr. Bowen: No objection.

The Court: Admitted.

Q. Doctor Cline, if a person is in a fainting con-

(Testimony of Doctor C. M. Cline.)

dition and has fainted, is it possible that involuntary urination or a discharge of urine might occur?

A. Yes sir.

Mr. McCutcheon: That is all.

Recross Examination

By Mr. Bowen:

Q. Do you know where the X-ray is that was taken on the day the injury occurred?

A. I imagine Doctor Soderquist has it. Pictures taken for Doctor Soderquist remain in his charge.

Mr. Bowen: That is all, Doctor.

The Court: As I understand it, Doctor, your examination of June 24th showed that this lady had sustained a definite fracture?

A. Yes sir.

The Court: In the bone of the forearm close to the wrist bone?

A. Yes sir.

The Court: That is all.

Mr. McCutcheon: That is all. [123]

G. W. MILLER

being called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McCutcheon:

Q. Please state your name?

A. G. W. Miller.

(Testimony of G. W. Miller.)

Q. Where do you reside? A. Idaho Falls.

Q. When did you come to Idaho Falls?

A. The latter part of August 1941.

Q. Since that time what has been your occupation?

A. Store manager for Montgomery Ward and Company.

Q. You were such manager about the 26th of November 1941? A. Yes sir.

Q. On that day was your attention directed to the plaintiff, Mrs. Lamberson? A. Yes sir.

Q. About what time of day was your attention directed to her?

A. I cannot remember but I know it was sometime in the afternoon of that day.

Q. How was your attention called to Mrs. Lamberson?

A. Someone phoned me and told me that there had been a lady injured and that I better come down.

Q. In response to that, what did you do? [124]

A. I went down and I believe that Mr. Peterson was with Mrs. Lamberson about the center of the floor in the aisle.

Q. In what department was that?

A. The men's department.

Q. That is on the first floor?

A. Yes, the main floor.

Q. Who else was present at that time?

A. At the moment I don't think anyone else was present.

(Testimony of G. W. Miller.)

Q. Just Mr. Peterson.

A. Just Mr. Peterson was with her at that time, I believe.

Q. Did you have a conversation with her?

A. Yes sir, I asked where she had fallen, and if she was injured. I believe that the first thing she said at that time was that she was very faint and I immediately tried to get a stool for her to sit down. I offered to have her sit down right there rather than move any further. Then I asked her about the injury to her arm.

Q. What did you ask her?

A. She thought it was broken. Of course, the wrist was swollen, as far as I could see it was only slightly swollen, that's the way it seemed to me, and it didn't appear to me personally, although I haven't viewed many broken arms, that it was broken at that time. She was weak and she was excited or excitable, and it was better to remain quiet. She sat down on a small stool there in the aisle. I don't [125] remember just what happened at that time.

Q. Did you inquire how she happened to sustain this injury?

A. I don't remember whether I did or not.

Q. And of course, you don't remember whether she made any reply as to that?

A. No sir, I don't.

Q. After she sat on the stool there in the aisle, what occurred?

A. I got Mrs. Williams and Mrs. Merrill to as-

(Testimony of G. W. Miller.)

sist Mr. Peterson, I think we said that we would call the Doctor immediately. Mrs. Lamberson was asking for a glass of water and one of the girls went after the water. I thought that if Mrs. Lamberson would sit there for a moment that we could get a Doctor. I know I was interested in getting a Doctor. I don't remember whether I left and turned her to Mr. Peterson and Mrs. Williams or not, but I know they remained with Mrs. Lamberson. I don't just remember or know what happened after that, what I did or anything about it.

Q. Was she removed from the place she occupied there?

A. Yes sir, by Mr. Peterson and Mrs. Williams to a more comfortable position as soon as she regained her consciousness. I detailed someone to get the Doctor but we couldn't locate him.

Q. Were you there until she left the store later on? A. No sir.

Q. Were you around the store? [126]

A. Yes sir.

Q. Was she conscious during the time you were in her presence? A. Yes sir.

Q. So that you were not present when she fainted as she has testified. A. No sir.

Q. Subsequent to that time what did you do relative to examining the premises?

A. Well,—

Q. I mean particularly at the entrance.

A. Mrs. Lamberson had left the store when I went and got one of my assistants, Mr. Molen, and

(Testimony of G. W. Miller.)

I asked Mr. Molen to accompany me to the vestibule to see the condition of the place where she claimed she fell. I also got another man, Mr. Tracy, who picked up Mrs. Lamberson. We examined the vestibule and it was perfectly dry as far as the vestibule was concerned, but the sidewalk was wet, it was thawing. We had our janitor clean off the sidewalk several times, using a broom.

Q. Was there any snow on the sidewalk?

A. No snow visible except in one place, a small patch around the corner of the window where Mrs. Lamberson fell, that had fallen off the eaves. It was a new patch of snow, probably one foot square and no one had stepped in it, we noticed that particularly.

Q. Had this splashed in to the vestibule? [127]

A. No sir, it was south of the vestibule.

Q. How far south?

A. A good two feet. We have a small box built over the awning to protect the awning when it is rolled up. That box had the snow on and when it thawed that snow fell off. We had our man out to clean off the sidewalk several times that day.

Q. Sweeping it off with a broom?

A. Yes sir, when the snow melted.

Q. That was Mr. Tracy? A. Yes sir.

Q. Where is Mr. Tracy now?

A. In the air corps, I think he is at Blackville, Arkansas.

Q. Did you make an effort to get him here?

A. Yes sir, but we couldn't locate him until a

(Testimony of G. W. Miller.)

few days ago and his commander will not allow him to leave camp.

Q. How many entrances are there to the store on Shoup Avenue? A. Four.

Q. Calling these from the entrance to the north, what is the first, what department?

A. That is in to the Farm store.

Q. And the second from the north?

A. The men's department.

Q. That is the third from the south?

A. Yes sir.

Q. There are two entrances south of that?

A. Yes sir. [128]

Q. Which is the most largely or generally used of these various entrances?

A. The first on the south.

Q. That is a short distance from Shoup and B Streets?

A. Not over eight feet from the corner.

Q. What is the relative situation or position of the active business houses on B Street and Shoup Avenue relative to the southwest corner of your store?

A. Of course, we have a large store on the corner, and directly opposite, or "kitty-cornered" is the C. C. Anderson Company store, one of the larger stores of the town, and directly across is the Thompson Department store. The reason that entrance is used so much is that customers come across from C. C. Anderson's store and Thompson's and

(Testimony of G. W. Miller.)

they use that entrance. The others are very little used.

Q. Were you there when Mrs. Lamberson was taken from the store? A. Yes sir.

Q. What did you do relative to assisting her to the taxi? A. Nothing.

Q. It was by your direction that she was taken to the Doctor? A. Yes sir.

Q. It was her desire to be taken to her Doctor?

A. I left that to Mr. Peterson, Mrs. Merrill and Mrs. Williams. The reason for that was—— [129]

Mr. Anderson: We object to what the reason was, any reason he might give.

Q. That is all right. Now, Mr. Miller, what care was used on this day to have the entrance and sidewalk on the west side of the store kept clean and free from snow or water?

A. We have several rules in the store during snow and cold weather. This day being a thawing day our janitor has to keep our sidewalk free of ice and snow. Our ramps coming from the sidewalk in to the store must be clean and dry as possible. Due to the fact there we have very little rise there isn't much of a slope from the door to the sidewalk.

Q. How deep is this vestibule from the sidewalk to the door of the store? A. Seven feet.

Q. What is the rise or difference in elevation from the east edge of the sidewalk to the door?

A. Slightly under one inch.

Q. And how deep did you say it is?

(Testimony of G. W. Miller.)

A. Seven feet.

Q. So that the slope would be $1/7$ of an inch per lineal foot, or less? A. Yes sir.

Q. Of what material is the floor of that vestibule constructed?

A. Rough tile one inch by possibly two inches, rough surface, not glazed. [130]

Q. Is each of these entrances the same material?

A. Yes sir.

Q. Did you ever hear of anyone slipping on either of these entrances before?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial, and hearsay.

The Court: Overruled.

Mr. Anderson: Exception please.

A. No sir.

Q. During the time you were there did anyone ever slip on these entrances?

Mr. Anderson: The same objection, incompetent, irrelevant and immaterial, and also hearsay.

The Court: Overruled.

A. No sir.

Mr. McCutcheon: That is all.

Cross Examination

By Mr. Bowen:

Q. When you stated that Mrs. Merrill assisted Mrs. Lamberson did you mean Mrs. Elaine Merrill, the lady who testified here? A. Yes sir.

Q. At the time Mrs. Lamberson was injured was there any rubber matting, sand or ashes on this tile?

(Testimony of G. W. Miller.)

A. No sir, it wasn't necessary.

Mr. Anderson: We move that part, "it [131] wasn't necessary" be stricken as not responsive.

The Court: That motion is granted, it may be stricken.

Q. How long was it from the time Mrs. Lamberson was injured until she left the store?

A. I don't think it was over fifteen or twenty minutes. There was a little delay in getting the taxi and getting the Doctor, that was the only delay. I tried to get the Doctor personally and then got someone else to get the Doctor.

Q. Your best judgment would be fifteen or twenty minutes that she was there?

A. Approximately.

Q. Did you, yourself have any other conversation with Mrs. Lamberson other than you stated?

A. Did I have any conversation with her?

Q. Any conversation other than you have stated.

A. I don't remember, except that I asked her about her wrist, and her opinion that it was broken, I know that she said that I said if she could move her fingers it wasn't broken. I don't remember that.

Q. What did she say about her back hurting?

A. Not a thing.

Q. You wouldn't say, Mr. Miller, that she didn't say her back hurt? A. I don't recall it.

Q. What time did the store close that day? [132]

A. Six o'clock.

Q. What time did these men that you mentioned go to look at this place?

(Testimony of G. W. Miller.)

A. At the time she was getting into the taxi.

Q. Will you tell us how often you have the vestibule cleaned and washed?

A. Clean them the first thing when we open in the morning.

Q. Daily? A. Yes sir.

Q. In the stormy weather?

A. In stormy weather twice or three times or however necessary it is during the day.

Q. Do you recall the kind of day it was the day Mrs. Lamberson was injured?

A. I don't recall it exactly but it was thawing.
Mr. Bowen: That's all.

Redirect Examination

By Mr. McCutcheon:

Q. How are these entrances cleaned?

A. When I first went to the store I hadn't been in Idaho for twelve years. I had lived here twelve years ago, but I had been in California for ten years. Not having been in any extreme cold weather I didn't know very much about the treatment of windows and so on in that kind of weather, so the first cold snap gave me an education. I let the man [133] wash the windows on the inside and they remained frosted, not only one day but for several days. That taught me not to wash the windows during the cold weather, and we cleaned our sidewalks and ramps off every morning with salt. We never used any water in the cold weather, and it was cold weather at that time. We never used any

(Testimony of G. W. Miller.)

water, we always have our men clean the windows with just rags after the first freeze, and we use salt on the sidewalk and ramps.

Q. What would you say about your directions having been complied with as to the cleaning of the vestibules and the ramps?

Mr. Anderson: Objected to as calling for a conclusion.

The Court: He may answer if he knows.

Q. Did they obey your instructions?

A. I think they conscientiously did because we were afraid of the ice that forms on the sidewalk.

Mr. Anderson: We move to strike that as a conclusion of the witness.

The Court: The latter part may go out as not responsive.

Q. To your knowledge was there water used on that ramp on November 26, 1941 in the afternoon?

A. No sir, there was not.

Q. How soon after *Mr.* Lamberson fell was it that you went out [134] to examine this vestibule or ramp?

A. I don't know exactly but it couldn't have been more than ten or fifteen minutes.

Q. You found it dry? A. Yes sir.

Q. Was there any water at all on the vestibule?

Mr. Anderson: Objected as leading, also it is argumentative. He has answered a very similar question.

The Court: Overruled.

Q. Any water there?

(Testimony of G. W. Miller.)

A. No, sir, none at all.

Mr. McCutcheon: That is all.

Recross Examination

By Mr. Bowen:

Q. You knew that tile was slippery and dangerous if it would become wet? A. No sir.

Q. You had no reason for keeping it dry?

A. Yes sir.

Q. What was that reason?

A. To keep people from tracking water into the store.

Q. People would not slip on it?

A. I defy you to slip on it.

Q. Describe that tile. [135]

A. I said the top was rough.

Q. What is fact as to being level?

A. As level as rough tile can be.

Q. You were not present at the time Mrs. Lamberson fell? A. No sir.

Q. As to whether it was wet at that time you don't know?

A. I viewed it ten or fifteen minutes afterward.

Q. And now will you answer the question?

A. No, I wouldn't know.

Mr. Bowen: That is all.

Mr. McCutcheon: That's all, Mr. Miller.

The Court: This man who had charge of the janitor work is now in the army?

A. Yes sir.

MRS. OUITA WILLIAMS

being called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McCutcheon:

Q. Please state your name?

A. Ouita Williams.

Q. Where do you live, Mrs. Williams?

A. 439 22nd street.

Q. In Idaho Falls? A. Yes sir [136]

Q. Were you there in November 1942?

A. Yes sir.

Q. What was your occupation at that time?

A. Saleslady at Montgomery Ward and Company.

Q. Do you still occupy that position?

A. Yes sir.

Q. I meant to say in November 1941 when I said

42. A. Yes sir, I was there.

Q. Do you remember about November 26, 1941 that you met Mrs. Lamberson one of the plaintiffs in this case.

A. Yes sir.

Q. Where were you at that time?

A. When I first saw her?

Q. Yes.

A. She was sitting on a stool there and I was wondering what was wrong and I went to investigate.

Q. What did you discover?

A. I saw her on the stool and I asked if she was hurt and she said "yes".

(Testimony of Mrs. Ouita Williams.)

Q. Was Mr. Miller there? A. Yes sir.

Q. What instructions did you receive from Mr. Miller, if any?

A. He told me to stay with her.

Q. Did you stay with her? A. Yes sir.

[137]

Q. What was done after you observed her?

A. She called for a drink, and Elaine Merrill went for it. I stayed with her, and then she went to phone, I can't remember now which she did first.

Q. She went to phone and to get a drink?

A. Yes sir.

Q. Was Mrs. Lamberson moved from that position in which you saw her first? A. Yes sir.

Q. Who assisted in that?

A. Mr. Peterson and myself.

Q. Where did you take her?

A. To the shoe department.

Q. How far is that.

A. About from here to the back wall.

Q. About thirty or forty feet.

A. I wouldn't know in feet.

Q. After she was moved to the shoe department what occurred?

A. She almost fainted, kind of sagged. I was on one side and Mr. Peterson on the other. She sank my way and I reached down and tried to hold her up, and we kind of dragged her to the shoe department and laid her on the floor.

Q. She had fainted before you laid her on the floor. A. Yes sir.

(Testimony of Mrs. Ouita Williams.)

Q. How long was she unconscious? [138]

A. Not very long, she came right out of it.

Q. In the meantime Mrs. Merrill had gone for the water to bathe her hands and face with?

A. Yes sir.

Q. Did you administer any first aid?

A. Yes sir.

Q. Did you have occasion to observe the condition of her clothing at that time?

A. Yes sir. I tried to hold her up, I had my arm around her.

Q. Did you notice her stockings?

A. They were not wet then, when we took her to the shoe department.

Q. They were not wet. A. No sir.

Q. After she was laid on the floor what happened relative to her clothing?

A. I asked if she felt better, I asked if she wanted to get up and she said she would and I helped her up and her clothes were wet.

Q. What had happened to her clothing to make them wet? A. She had urinated on her clothes,

Q. While she was unconscious. A. Yes sir.

Q. What was done after you got her on her feet, about relieving her? [139]

A. They called a taxi and took her to the Doctor.

Q. Did you have a conversation with her while she was in your charge?

A. I asked her name and address, and she said

(Testimony of Mrs. Ouita Williams.)

she felt foolish fainting like that, but that she fainted quite easily.

Q. Did she say anything about fainting before?

A. She said she fainted easily.

Q. Did she say anything about how she happened to fall? A. No sir.

Q. Can you remember what the weather was that day? A. No sir.

Mr. McCutcheon: That is all.

Cross Examination

By Mr. Bowen.

Q. Are you employed by anyone at this time?

A. Yes sir.

Q. Who.

A. Montgomery Ward and Company.

Q. How long have you been employed by Montgomery Ward and Company?

A. Off and on for between six and seven years.

Q. Continuously? A. No.

Q. But you are in their employ at this time.

A. Yes sir. [140]

Q. How long was Mrs. Lamberson in the store after you first observed her, before she left?

A. About ten or fifteen minutes. I imagine it might have been twenty, I don't know exactly how long.

Q. Where was Mr. Miller when you first observed Mrs. Lamberson? A. He was with her.

Q. Did he remain with her until she left the store?

(Testimony of Mrs. Ouita Williams.)

A. No sir, he told me to watch her.

Q. Mrs. Williams, you paid particular attention to Mrs. Lamberson's stockings that day?

A. No, I didn't see her stockings that day. I didn't pay any attention.

Q. You never observed her stockings at any time she was in the store that day.

A. No, I was too busy.

Q. Tell us how you know that Mrs. Lamberson urinated?

A. Because when I took her to the shoe department she started to sink on my side and when I reached my hands under her I noticed there was nothing wet,—I mean I didn't notice anything in the shoe department.

Q. It might have been there and you not noticed it?

A. No sir, because I took my hand away right quick and caught her elsewhere.

Q. As to that moisture, you don't know what it was?

A. I know that there was no water around. [141]

Q. You stated your own conclusions as to what you thought it was, didn't you?

A. Well, I guess I don't know what it was.

Q. It may have been blood.

A. Blood would be red.

Q. How do you know what it was.

A. If it wasn't that I don't know what it was, no one spilled any water around there.

(Testimony of Mrs. Ouita Williams.)

Q. No water was spilled at any time you administered to her. A. That's right.

Q. It couldn't have been from the water put on her face or from the water that she drank.

A. That's right.

Q. And the answer you gave is the best answer you can give. A. That's right.

Mr. Bowen: I think that's all.

Redirect Examination

By Mr. McCutcheon.

Q. It was below her waist.

A. Yes sir, I reached under her thigh, and put my hand up high.

Q. And had you had your hand down there when you first moved her to the shoe department?

A. Yes sir.

Q. And what was the condition of her garments at that time? [142] A. My hands were dry.

Q. It was not wet at all until after she fainted and lay on the floor? A. That's right.

Mr. McCutcheon: That is all.

Mr. Bowen: That's all.

CECIL D. PETERSON

Being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McCutcheon.

Q. Please state your name?

A. Cecil D. Peterson.

Q. Where do you reside?

A. Now I reside in Weiser, Idaho.

Q. Where were you living in November 1942,
—November 26th.

A. You mean 1941.

Q. Yes.

A. 427 F street, Idaho Falls.

Q. What was your occupation then?

A. Charge of the men's clothing department in
Montgomery Ward and Company store.

Q. You are still working for Montgomery Ward
and Company?

A. Yes sir.

Q. In the Weiser store.

A. Yes sir. [143]

Q. On that day, November 26, 1941 you were on
duty at the store, were you?

A. Yes sir.

Q. Did you have occasion to see Mrs. Lamberson?

A. Yes sir.

Q. What time of day was that?

A. Sometime in the afternoon, between three
and four.

Q. What was it that directed your attention to
her?

A. Mr. Tracy brought her from the front of the
store, got her to the Shoe department and Mr. Miller
called me over to take care of Mrs. Lamberson.

(Testimony of Cecil D. Peterson.)

Q. Did you know her before that time?

A. No sir.

Q. What did you do at that time?

A. I stayed with her until the two girls came and then I went and called a taxi.

Q. Did you have a conversation with her prior to the time the ladies came? A. No sir.

Q. Can you recall the condition of the weather?

A. It was quite sunny. It was melting on the sunny side of the buildings.

Q. Which way does that store face?

A. West.

Q. And would that be the sunny side? [144]

A. In the afternoon.

Q. Did you make any examination of the vestibule and the ramp that day?

A. No sir, I was busy taking her to the Doctor.

Q. What did you do to give her help?

A. We got her to the shoe department and as soon as we revived her I called a taxi and took her to the back door and took her up to the Doctor's office.

Q. You assisted her out of the back door to the taxi?

A. Yes sir, and up to the Doctor's office.

Q. Did you observe, when you first took charge of her, the condition of her garments?

A. No sir, I did not.

Q. How long was she in the store after you left her and went to call a taxi?

A. Wasn't over fifteen minutes, I don't think.

(Testimony of Cecil D. Peterson.)

Q. Who was with you when you and Mrs. Lamberson walked out to the rear entrance to get into the taxi?

A. One of the girls either Mrs. Merrill or Mrs. Williams.

Q. You don't recall which?

A. No sir, I don't.

Q. Did you have any conversation with Mrs. Lamberson until you got her to Doctor Soderquist's office?

A. Yes sir, a few moments.

Q. Where was that? [145]

A. In the taxi and in the shoe department as I was there with her, two ladies passed and smiled and said "you are up to your old tricks again" and left.

Q. At that time and place and occasion did you make any inquiry as to how she had fallen?

A. I didn't, no, but she told me that she fell before.

Q. What did she say relative to having fallen before?

A. She said she didn't know how she fell, but it happened once before at a basket ball game.

Q. Did she say anything about her fainting spells, being subject to fainting spells?

A. No sir.

Q. You took her to the Doctor's office.

A. Yes sir. I called her husband and they said they would get in touch with him where he was working.

Q. Did you know the ladies who made this remark you stated?

(Testimony of Cecil D. Peterson.)

A. No sir, I have seen them around town but I wasn't acquainted with them.

Q. Did Mrs. Lamberson make any reply to their remark?

A. No sir, she was too weak, she didn't feel much like talking.

Mr. McCutcheon: That is all.

Cross Examination

By Mr. Bowen.

Q. When these two ladies passed and made the remark, was that while she was in the fainting condition? [146]

A. No. While I was taking her to the taxi, she was hanging on to my shoulder.

Q. The taxi was in the alley. A. Yes sir.

Q. Was that where this conversation took place.

A. No sir, in the shoe department, that arch-way to the ladies side, they had come around the corner of the ladies side, that is where they seen her.

Q. You don't know those ladies?

A. No sir.

Q. Did Mrs. Lamberson tell you when it was that she fell at a basket ball game?

A. No sir, she said she fell at a basket ball game.

Q. You don't know how many years before it was, or anything about it. A. No sir, I don't.

Q. That is all she told you. A. Yes sir.

Mr. Bowen: That's all.

Mr. McCutcheon: Yes, that's all.

The Court: We will take a ten minute recess.

3:05 P. M. October 15, 1942

G. W. MILLER,

Being recalled as a witness for the defendant, having heretofore been duly sworn, testifies as follows:

[147]

Direct Examination

By Mr. McCutcheon:

Q. Mr. Miller, who inspected the entrance-way and the ramp with you on that day.

A. Mr. Molen.

Q. Was he an employee of yours at that time.

A. Yes sir.

Q. Where is he now.

A. He is a civilian employee of the air corps.

Q. How long have you been in the merchandising business for Montgomery Ward and Company.

A. Eleven years.

Q. How many stores have you acted as manager of?

A. Five.

Q. With respect to the floor or ramps or the vestibule on these entrances, what is the practice of the Company about the construction of similar floors of passage-ways in all of their stores?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. The floors that we have there has been constructed by the construction department, I don't mean in all of the stores, but at least seventy or eighty per cent of the stores, they have this same ramp. [148]

(Testimony of G. W. Miller.)

Q. Of tile set together with cement.

A. Yes sir.

Q. Do you know of anything that you might have done, or which was omitted, to provide ordinary care for the safety of your customers.

Mr. Anderson: Objected to as that is a question for the court.

The Court: Overruled.

A. Well, no, I don't know of anything that was omitted. We have printed safety rules——

Mr. Anderson: We object to what they have printed, that is self serving.

The Court: It is not responsive.

Mr. McCutcheon: That is all.

Cross Examination

By Mr. Bowen:

Q. What is ordinary care?

A. That is to say that we look out for the people we are serving, enticing into our store, to see that they are well served for their safety so that they won't get injured in the store, no oil on the floors, seeing that the aisles are clear, and that the doorways are working perfectly.

Mr. Bowen: That is all.

Redirect Examination

By Mr. McCutcheon: [149]

Q. Those conditions prevailed in the store on the afternoon of November 26, 1941?

(Testimony of G. W. Miller.)

A. To the best of my ability, I would say yes, they did.

Mr. McCutcheon: That's all. We rest.

MR. CHESTER A. LAMBERSON

Recalled in rebuttal as a witness on the part of the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Directing your attention to June 24, 1942 when you went up and was examined by Doctor Cline, what is the fact as to whether or not you told him anything about having an arthritic condition, or arthritis? A. I never told him anything.

Q. Directing your attention to the time that you were in the shoe department after you had been injured do you recall two ladies passing by and one of them saying to you "you are up to your old tricks again"?

A. No I don't remember that.

Q. Did that occur?

A. No sir, I passed one lady I knew but she didn't say that.

Q. Was anything in substance or effect like that said to you? A. No sir.

Q. Directing your attention to the time you were riding over [150] from Montgomery Ward's to Doctor Soderquist's office with Mr. Peterson, what is

(Testimony of *Mr. Chester A. Lamberson.*)

the fact as to whether you told him that you had fallen or fainted at a basket ball game?

A. I never told him I had fainted.

Q. What is the fact as to whether you told Mrs. Williams who testified here that you said you fainted easily, did you tell her that?

A. I don't recall it.

Q. Mrs. Lamberson, after you had fainted and got on your feet again, what is the fact as to whether or not you urinated after you had been injured, or at any time while you were at Montgomery Ward and Company store from the time you were hurt until you left the store?

Mr. McCutcheon: Objected to because the occurrence happened when she was unconscious.

The Court: She may answer to the best of her ability.

A. I never did.

Mr. Bowen: That is all.

Mr. McCutcheon: No questions.

Mr. Bowen: We rest.

Mr. McCutcheon: We have no surrebuttal.

(Duly Verified.)

[Endorsed]: Filed January 28, 1943. [151]

[Title of Court and Cause.]

MOTION FOR THE ASSOCIATION
OF ADDITIONAL ATTORNEYS FOR
DEFENDANT:

Comes now the defendant, Montgomery Ward and Company, a corporation, by its attorney of record, Otto E. McCutcheon, and moves the Court that an order be made herein for the association and entering of W. B. Powell, 2825 East 14th Street, Oakland, California, and W. L. Schoener of 2825 East 14th Street, Oakland, California, attorneys for the defendant.

MONTGOMERY WARD AND
COMPANY,

By OTTO E. McCUTCHEON
Its attorney of record.

It is so ordered;

Feb. 2nd, 1943

LLOYD L. BLACK
District Judge.

[Endorsed]: Filed February 2, 1943. [153]

[Title of Court and Cause.]

ORDER AS TO DEFENDANT'S
EXHIBIT NO. 4.

The defendant in the above entitled cause having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made

and entered herein, and it appearing to the Court that defendant's Exhibit No. 4 consists of a negative of an x-ray picture described at page 62 of the reporter's transcript and admitted in evidence as ordered at page 63 of said transcript, should be inspected by the appellate court and sent to the appellate court in lieu of copies thereof.

It Is Hereby Ordered that the original defendant's Exhibit No. 4 be sent to the appellate court in lieu of copies thereof, to be by such court held for inspection and used on the appeal taken by the appellant; and it is further ordered that upon completion of the use thereof by the appellate court that the same be returned to this court.

Dated at Boise, Idaho, February 20, 1943.

L. B. SCHWELLENBACH

Acting District Judge.

[Endorsed]: Filed February 24, 1943. [154]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Comes now the defendant-appellant, Montgomery Ward and Company, a corporation, and hereby designates the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

The complete record and all the proceedings and evidence in the action, including:

1. The complaint.
2. The motions and notice to dismiss the action, etc.
3. Order of the Judge ruling on motions dated July 7th, 1942.
4. Bill of particulars.
5. Stipulation extending time to answer.
6. Answer.
7. Opinion dated October 20, 1942, by Judge Healy.
8. Findings of fact and conclusions of law.
9. Notice of application to have costs and disbursements taxed, and memorandum of costs and disbursements.
10. Notice of motion for stay of proceedings.
11. Motion for stay of proceedings to give time to file notice and motion for new trial, dated October 28th, 1942.
12. Judgment dated October 28th, 1942.
13. Order granting stay of execution.
14. Bond on stay of execution executed by United States Fidelity and Guaranty Company October 30th, 1942.
15. Motion for new trial, with all affidavits attached.
16. Notice of motion calling for hearing motion for new trial, dated December 23rd, 1942.
17. Order denying motion for new trial dated January 29th, 1943, and signed by Judge Healy. [155]

18. Notice of appeal dated January 22nd, 1943.
19. Cost bond on appeal with certified copy of power of attorney attached.
20. Petition for approval of supersedeas and stay on appeal.
21. Order approving bond and granting a stay of execution.
22. Supersedeas bond with certified copy of power of attorney attached and signature of Judge Black approving bond as to sufficiency, form, and surety, and allowing the same as a supersedeas.
23. All court minutes relating to case.
24. All entries on "Civil Docket" of said court relating to said cause and particularly date of entry of judgment and date of filing notice of appeal.
25. Statement of points on which defendant-appellant intends to rely on appeal as styled in the District Court.
26. Transcript of all testimony taken at the trial of which two copies thereof heretofore have been filed with the Clerk of the Court by the Reporter.
27. Motion for the association of additional attorneys for defendant and order granting motion.
28. Application for order dispensing with printing defendant-appellant's Exhibit No. 4.
29. Affidavit accompanying application listed as No. 28 aforesaid.

30. Order as to original exhibits.

No. 26 is all testimony taken at the trial, the same being contained in the Reporter's transcript, two copies of which heretofore have been filed with the Clerk of this Court; and

31. The last item, being this paragraph No. 31, being this Designation of Contents of Record Proceedings and evidence on appeal, and proof of service.

32. The order designating Judge William Healy to try the case. [156]

33. The order designating Judge Black to act as District Judge in this District of Idaho.

Respectfully submitted,

W. B. POWELL

2825 East 14th Street,
Oakland, California

W. L. SCHOENER

2825 East 14th Street,
Oakland, California

OTTO E. McCUTCHEON

208 Salisbury Building,
Idaho Falls, Idaho.

Attorneys for Defendant-Appellant.

Service of a copy of the foregoing Designation of Contents of Record on Appeal admitted this 16th day of February, 1943.

CLYDE BOWEN

First Security Bank Building,
Pocatello, Idaho.

W. H. ANDERSON

Pocatello, Idaho.

WM. S. HOLDEN

American National Bank

Building

Idaho Falls, Idaho.

Attorneys for Plaintiffs-Appellees.

[Endorsed]: Filed Feb. 18, 1943. [157]

ORDER DESIGNATING UNITED STATES
DISTRICT JUDGE PURSUANT TO R. S.
Sec. 591 (28 U.S.C.A. Sec. 17)

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of section 591 of the Revised Statutes of the United States (28 U.S.C.A. Sec. 17), do hereby designate and appoint the Honorable William Healy, United States Circuit Judge, for the Ninth Judicial Circuit, to hold the District Court of the United States for the District of Idaho, from October 4, 1942, to and including November 4, 1942 and to have and exercise within said District the same powers that are vested in the judge thereof.

Dated, San Francisco, California, this 18th day of August, 1942.

CURTIS D. WILBUR

Senior United States Circuit
Judge for the Ninth Judicial Circuit.

[Endorsed]: Filed August 24, 1942. [158]

ORDER DESIGNATING UNITED STATES
DISTRICT JUDGE PURSUANT TO R. S.
Sec. 591 (28 U.S.C.A. Sec. 17)

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of section 591 of the Revised Statutes of the United States (28 U.S.C.A. Sec. 17), do hereby designate and appoint the Honorable William Healy, United States Circuit Judge, for the Ninth Circuit, to hold the District Court of the United States for the District of Idaho, to hear the case of *Chester Lamberson v. Montgomery Ward & Co.*, from December 21, 1942, to the completion of the case, and to have and exercise within said District the same powers that are vested in the judge thereof.

Dated, San Francisco, California, this 21st day of December, 1942.

CURTIS D. WILBUR

Senior United States Circuit
Judge for the Ninth Judicial Circuit.

[Endorsed]: Filed December 26, 1942. [159]

ORDER DESIGNATING UNITED STATES
DISTRICT JUDGE PURSUANT TO R. S.
Sec. 591 (28 U.S.C.A. Sec. 17)

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of section 591 of the Revised Statutes of the United States (28

U.S.C.A. Sec. 17), do hereby designate and appoint the Honorable Lloyd L. Black, United States District Judge, for the Western District of Washington, to hold the District Court of the United States for the District of Idaho, from February 1, 1943, to and including February 15, 1943 and to have and exercise within said District the same powers that are vested in the judge thereof.

Dated, San Francisco, California, this 18th day of January, 1943.

FRANCIS A. GARRECHT

Acting Senior United States
Circuit Judge for the Ninth
Judicial Circuit.

[Endorsed]: Filed January 21, 1943. [160]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 160, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the

United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$37.55, and that the same have been paid in full by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 24th day of February, 1943.

[Seal]

W. D. McREYNOLDS
Clerk.

[Endorsed]: No. 10378. United States Circuit Court of Appeals for the Ninth Circuit. Montgomery Ward and Company, a corporation, Appellant, vs. Chester A. Lamberson and Lydia Lamberson, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed February 26, 1943.

PAUL P. O'BRIEN

Clerk of the United States
Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10378

MONTGOMERY WARD AND COMPANY, a
corporation,

Appellant,

vs.

CHESTER A. LAMBERSON and LYDIA LAM-
BERSON,

Appellees.

APPLICATION FOR ORDER DISPENSING
WITH PRINTING APPELLANT'S EX-
HIBIT No. 4.

To the Honorable Judges of the Ninth United
States Circuit Court of Appeals:

The petition of Montgomery Ward and Company,
a corporation, Appellant, respectfully shows:

That an appeal has been perfected by your pe-
titioner to this Court from the judgment rendered
in the United States District Court for the District
of Idaho, Eastern Division, in a suit wherein Ches-
ter A. Lamberson and Lydia Lamberson were plain-
tiffs and your petitioner was the defendant, as more
fully appears from the affidavit of Otto E. Mc-
Cutcheon hereunto attached and made a part here-
of.

Also as appears from said affidavit several ex-
hibits were received in evidence, one of which was
numbered Defendant's Exhibit No. 4 which is not

of a printable type, the same being an x-ray photographic negative of the bones of the forearm, wrist, and hand of a human being, the circumstances of its unprintability and the grounds for this motion appearing more particularly in the annexed affidavit.

Wherefore, your petitioner prays that an order be made and entered herein dispensing with the printing of the said exhibit, the original of which will be forwarded by the Clerk of the District Court in due course of appeal.

MONTGOMERY WARD

AND COMPANY,

By OTTO McCUTCHEON

Attorney for Appellant.

So ordered:

FRANCIS A. GARRECHT

United States Circuit Judge

On reading and filing the foregoing petition and the accompanying affidavit, it is ordered that said Exhibit No. 4 be not printed.

.....

United States Circuit Judge.

State of Idaho,

County of Bonneville—ss.

Otto E. McCutcheon being first duly sworn deposes and says:

That he is one of the attorneys for Montgomery Ward and Company, a corporation, appellant herein, and makes this affidavit on behalf of said appellant for the purpose of securing an order dispensing with the printing of one exhibit in this case, the

same being defendant's Exhibit No. 4, so marked for identification in the lower court.

That judgment was rendered herein in favor of the plaintiffs and against the defendant on October 28th, 1942, and that on January 22nd, 1943, the defendant perfected an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, by filing an original and copies of notice of appeal and undertaking on appeal and undertaking for costs, and has since served and filed the additional papers required by the Rules of Court.

That on the 2d day of February, 1943, Judge Black, acting District Judge, in the District of Idaho, made an order for the original of the said Exhibit No. 4 to be forwarded to this Court with the record on appeal. That said Exhibit is not of a printable type because it is an x-ray photographic negative of the bones of the forearm, wrist and hand of a human being, and to show the purpose for which said exhibit was admitted in evidence the negative itself should be examined by the Court.

OTTO McCUTCHEON

Subscribed and sworn to before me this 26 day of February, 1943.

LOUISE KEEFER

Notary Public.

[Seal]

Residing at Idaho Falls, Ida.

[Endorsed]: Filed Mar 2, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH THE
APPELLANT, MONTGOMERY WARD
AND COMPANY, INTENDS TO RELY ON
APPEAL AND DESIGNATION OF REC-
ORD TO BE PRINTED.

Comes now the Appellant, Montgomery Ward and Company, a corporation, by its attorneys herein, and respectfully represents to this Honorable Court that in the above styled and numbered cause it intends to rely upon the following statement of points on appeal:

1

That the Court erred in denying the motion of the defendant for an order requiring plaintiffs to make a more definite statement of their alleged cause of action referred to in defendant's motion as paragraph Second and sub-paragraphs (a) and (b) for the reason that the said complaint was uncertain, ambiguous and indefinite in the particulars described in the said sub-paragraphs of paragraph Second and each of them.

2

(1) The Court erred in finding that the defendant was negligent in allowing water to be and remain upon the ramp or entrance way without any sand or ashes or matting to cover the same;

(2) The Court erred in finding that at the time of plaintiff's injury the ramp or entrance way was under the exclusive control of the defendant;

(3) The Court erred in finding that the plaintiff Lydia Lamberson fell upon the ramp or entrance way as a proximate cause of the same being wet, and further that the same was wet due to defendant's negligence and the absence of ashes or sand or matting upon said ramp;

(4) The Court erred in finding that the plaintiff, Lydia Lamberson, was not contributorily negligent in passing out and over said ramp or entrance way and in her use thereof for egress from the store;

(5) The Court erred in finding that the defendant did not give plaintiff, Lydia Lamberson, any warning or notice of water being upon said ramp or entrance way prior to or at the time of her passing out and over the same;

(6) The Court erred in finding that the said ramp or entrance way was unsafe for patrons and persons using same because there were no ashes, sand or matting thereon;

(7) The Court erred in admitting the testimony of Lydia Webb Theusen and Ethel Criddle regarding the presence of water on the ramp in question for the reason that it was not shown that said testimony was related to the time of the accident.

3

That the evidence is insufficient to support a finding that defendant was guilty of any negligence as charged in the complaint, or at all, for which reason the Court erred in making and entering its findings of fact, and conclusions of law and judgment in favor of the plaintiffs.

4

That under the proofs submitted the only lawful judgment which could or should have been entered in said cause was a judgment in favor of the defendant and against the plaintiffs.

That the reasons for the foregoing Statement of Points are set forth as follows:

a. There was no proof that defendant had knowledge of the presence of water on the ramp or floor of the store entrance upon which plaintiff, Lydia Lamberson, alleged that she fell.

b. There was no proof that there was water present on the ramp or floor of the entrance for a sufficient length of time prior to the alleged fall of the plaintiff, Lydia Lamberson, to give or charge defendant with constructive notice thereof.

c. The proof affirmatively shows that the presence of water on the ramp or floor of the entrance to the store as alleged by plaintiffs to have been present, was visible and obvious to the plaintiff Lydia Lamberson as she left said store, and thus she had full knowledge thereof.

d. There was proof that plaintiff Lydia Lamberson was contributorily negligent in disregarding the dangers of an obvious condition of which she had knowledge and the defendant had none, and further that said plaintiff assumed any risk incident to her use of the ramp by stepping into a spot of water which she alleges was on said ramp or floor at the moment of her use.

e. That the defendant was not an insurer of the

safety of the plaintiff Lydia Lamberson as an invitee.

5

That the Court erred in awarding to the plaintiffs a lump sum of money for general damages without specifying what portion of the damages awarded was for permanent injuries alleged to have been sustained by the plaintiffs.

Appellant respectfully represents to the Court that in the foregoing statement of points the Appellant, Montgomery Ward and Company, is designated as the defendant, and the Appelles, Chester A. Lamberson and Lydia Lamberson, are designated as the plaintiffs.

Respectfully submitted, etc.

DESIGNATION OF RECORD TO BE PRINTED

Now comes the defendant-appellant, Montgomery Ward and Company, a corporation, and hereby designates the contents of the record, proceedings and evidence to be contained in the record on the appeal of the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit as follows:

The complete record certified to the Circuit Court of Appeals by the Clerk of the District Court including all the proceedings and evidence in the action and also including the following papers and documents filed in the Circuit Court of Appeals:

1. The petition and supporting affidavit dispensing with the printing of defendant-appellant's Ex-

hibit No. 4, and the order to be made and entered thereon.

2. The foregoing statement of points to be relied upon by the appellant on appeal.

3. The designation of the contents of the printed record on appeal as specified on this sheet aforesaid.

4. Proof of service hereof on attorneys for appellees.

Respectfully submitted,

W. B. POWELL

Residence: 2825 East 14th
Street, Oakland, California.

W. L. SCHOENER

Residence: 2825 East 14th
Street, Oakland, California.

OTTO McCUTCHEON

Residence: Idaho Falls, Ida.
Attorneys for Appellant.

Receipt of a copy of the foregoing Statement of Points to be relied on by appellant on appeal and designation of record to be printed admitted February 26th, 1943.

WILLIAM S. HOLDEN

CLYDE BOWEN

WALTER H. ANDERSON

Attorneys for Appellees.

[Endorsed]: Filed Mar. 2, 1943. Paul P. O'Brien, Clerk.

No. 10,378

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MONTGOMERY WARD & Co. (a corporation),
Appellant,

VS.

CHESTER A. LAMBERSON and LYDIA LAMBER-
SON,
Appellees.

Upon Appeal from the Judgment of the District Court of the
United States for the District of Idaho, Eastern Division.

**BRIEF OF APPELLANT,
MONTGOMERY WARD & CO., INCORPORATED.**

OTTO E. McCUTCHEON,
Idaho Falls, Idaho,

W. B. POWELL,
2825 East 14th Street, Oakland, California,

W. L. SCHOENER,
2825 East 14th Street, Oakland, California,

Attorneys for Appellant.

FILED

APR 26 1943

PAUL P. O'BRIEN,
CLERK

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No. 10,378

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MONTGOMERY WARD & Co. (a corporation),
Appellant,

VS.

CHESTER A. LAMBERSON and LYDIA LAMBER-
SON,
Appellees.

Upon Appeal from the Judgment of the District Court of the
United States for the District of Idaho, Eastern Division.

BRIEF OF APPELLANT, MONTGOMERY WARD & CO., INCORPORATED.

THE PARTIES.

Hereafter in this brief we shall refer to the plaintiff and appellee Chester A. Lamberson as "plaintiff husband," plaintiff and appellee Lydia Lamberson as "plaintiff Lydia Lamberson," or as "plaintiff wife," plaintiffs and appellees Chester A. and Lydia Lamberson as "plaintiffs" and defendant and appellant Montgomery Ward & Co., Incorporated as "defendant."

STATEMENT AS TO JURISDICTION.

On June 4, 1942, plaintiffs filed their action against defendant in the District Court of the United States for the District of Idaho, Eastern Division, alleging that plaintiff wife had sustained damages as the result of her fall at defendant's retail store at Idaho Falls, Idaho, on the 26th of November, 1941. Thereafter, and on August 11, 1942, defendant filed its answer in the within case and trial was had thereupon on October 15, 1942, without a jury resulting in a judgment for plaintiffs in the sum of \$1750.00 as general damages and \$195.00 as special damages, which judgment was entered on October 28, 1942. Thereafter, and on the 22nd day of January, defendant filed its notice of appeal from said judgment. To this notice of appeal defendant attached a statement of points. (Tr. p. 66.)

The jurisdiction of this Court to hear the cause thus presented derives from Section 128 of the United States Judicial Code, 28 U.S.C.A. 225.

STATEMENT OF THE CASE.

Defendant operates in the City of Idaho Falls, Idaho, a retail store on Shoup Avenue in said city and state. On the 26th day of November, 1941, plaintiff entered defendant's store allegedly for the purpose of shopping. Shoup Avenue runs approximately north and south, and plaintiff wife entered defendant's store through the third door from the south. (Tr. p. 72.) After looking through the store for a half hour or

more, plaintiff wife left the store by the same door through which she had entered. (Tr. p. 73.)

As she went out of the door, upon her second step down the ramp, from said door, her feet slipped and she fell to the tile floor of the ramp and sat upon a spot of water. (Tr. p. 73.) The presence of the moisture was due to a cause or causes unknown, and the length of time for which the moisture had existed upon the ramp was not shown. Mrs. Lamberson, in falling sustained a fracture of the distal end of the right radius. (Tr. p. 121.) Plaintiffs filed action against defendant Montgomery Ward & Co. for damages for her injuries, and the case was tried to the Court, without a jury, on October 15, 1942, before the Honorable William Healy, United States Circuit Judge presiding. Plaintiffs were awarded a judgment against defendant in the sum of \$1750.00 as and for general damages, and the sum of \$195.00 as and for special damages.

SPECIFICATION OF ERRORS RELIED UPON.

(References to the portion of this brief which argues the specification are indicated in each instance.)

1.

That the Court erred in denying the motion of the defendant for an order requiring plaintiffs to make a more definite statement of their alleged cause of action referred to in defendant's motion as paragraph second and subparagraphs (a) and (b) for the reason

that the said complaint was uncertain, ambiguous and indefinite in the particulars described in the said subparagraphs of paragraph second and each of them. (Proposition I.)

2.

(1) The Court erred in finding that the defendant was negligent in allowing water to be and remain upon the ramp or entrance way without any sand or ashes or matting to cover the same. (Proposition II D.)

(2) The Court erred in finding that at the time of plaintiff wife's injury the ramp or entrance way was under the exclusive control of the defendant. (Proposition II F.)

(3) The Court erred in finding that the plaintiff Lydia Lamberson fell upon the ramp or entrance way as a proximate cause of the same being wet, and further that the same was wet due to defendant's negligence and the absence of ashes or sand or matting upon said ramp. (Proposition III.)

(4) The Court erred in finding that the plaintiff, Lydia Lamberson, was not contributorily negligent in passing out and over said ramp or entrance way and in her use thereof for egress from the store. (Proposition IV.)

(5) The Court erred in finding that the defendant did not give plaintiff, Lydia Lamberson, any warning or notice of water being upon said ramp or entrance way prior to or at the time of her passing out and over the same. (Proposition II E.)

(6) The Court erred in finding that the said ramp or entrance way was unsafe for patrons and persons using same because there were no ashes, sand or matting thereon. (Proposition II D.)

(7) The Court erred in admitting the testimony of Lydia Webb Theusen and Ethel Criddle regarding the presence of water on the ramp in question for the reason that it was not shown that said testimony was related to the time of the accident. (Proposition II B.)

3.

That the evidence is insufficient to support a finding that defendant was guilty of any negligence as charged in the complaint, or at all, for which reason the Court erred in making and entering its findings of fact, and conclusions of law and judgment in favor of the plaintiffs. (Proposition II.)

4.

That under the proofs submitted the only lawful judgment which could or should have been entered in said cause was a judgment in favor of the defendant and against the plaintiffs.

That the reasons for the foregoing statement of points are set forth as follows:

a. There was no proof that defendant had knowledge of the presence of water on the ramp or floor of the store entrance upon which plaintiff, Lydia Lamberson, alleged that she fell. (Proposition II B.)

b. There was no proof that there was water present on the ramp or floor of the entrance for a sufficient

length of time prior to the alleged fall of the plaintiff, Lydia Lamberson, to give or charge defendant with constructive notice thereof. (Proposition II C.)

c. The proof affirmatively shows that the presence of water on the ramp or floor of the entrance to the store as alleged by plaintiffs to have been present, was visible and obvious to the plaintiff Lydia Lamberson as she left said store, and thus she had full knowledge thereof. (Proposition II E.)

d. There was proof that plaintiff Lydia Lamberson was contributorily negligent in disregarding the dangers of an obvious condition of which she had knowledge and the defendant had none, and further that said plaintiff wife assumed any risk incident to her use of the ramp by stepping into a spot of water which she alleges was on said ramp or floor at the moment of her use. (Proposition IV.)

e. That the defendant was not an insurer of the safety of the plaintiff Lydia Lamberson as an invitee. (Proposition II A.)

5.

That the Court erred in awarding to the plaintiffs a lump sum of money for general damages without specifying what portion of the damages awarded was for permanent injuries alleged to have been sustained by the plaintiffs. (Proposition V.)

SUMMARY OF ARGUMENT.

We propose to show:

First, that the plaintiffs' complaint failed to properly allege any negligence on the part of defendant.

Second, that the record is devoid of any evidence which would support a finding that defendant violated any duty owing to the plaintiffs.

Third, that the plaintiffs failed to prove that the facts alleged as constituting negligence upon the part of defendant were the proximate cause of the accident.

Fourth, that the record shows that the plaintiff wife was guilty of contributory negligence which was the direct and proximate cause of the accident, and which bars her recovery.

Fifth, that the award for damages for permanent injuries is not supported by any evidence in the record.

ARGUMENT.

I.

IT WAS REVERSIBLE ERROR TO DENY DEFENDANT'S MOTION TO MAKE THE COMPLAINT MORE CERTAIN WHERE SAID COMPLAINT ALLEGED MERE LEGAL CONCLUSIONS, AND FAILED TO PLACE UPON RECORD THE SPECIFIC AND PARTICULAR FACTS WHICH PLAINTIFFS CLAIMED ENTITLED THEM TO RECOVER, SO THAT DEFENDANT MIGHT COME PREPARED TO MEET THEM.

(Arguing Specification of Error 1.)

Section 5-605 of the Idaho Code of Civil Procedure provides as follows:

"5-605 Contents of Complaint: The Complaint must contain:

* * * * *

2. A statement of the facts constituting the cause of action in ordinary and concise language.”

Plaintiffs have stated their alleged cause of action based upon defendant's alleged negligence, as follows:

“IX.

That after being in said store for sometime shopping, the plaintiff, Lydia Lamberson, attempted to leave and depart through the same door which she entered; said third door from the south and the one through which plaintiff, Lydia Lamberson, entered and departed sloped up to the east from the sidewalk for a distance of approximately seven feet and the floor of the entrance to said door is hard tile and becomes very slick and slippery when wet; which is under the exclusive control of defendant.

X.

That at the time the plaintiff, Lydia Lamberson, entered said store of the defendant, through said third door from the south, said entrance from the sidewalk to the door, and the tile part hereinbefore mentioned, was dry and not slippery. That during the time that the said plaintiff, Lydia Lamberson, was in said store of the defendant, said defendant, through and by its agents, servants and employees, acting in the line, course, and scope of their employment, cast or threw considerable water upon said tile between the sidewalk and the said store door and wet the same, and that by reason thereof, the same was extremely slick and slippery; whereupon the plaintiff, Lydia Lamberson, attempted to depart through said third door from the south and upon approaching said sloping tile, by reason of the same being wet,

the plaintiff Lydia Lamberson's feet slipped out from under her and she fell with great force and violence and did then and there break her wrist and that by reason of said break said wrist is deformed and that she is permanently injured."

Defendant moved to make the statement of the plaintiffs' cause of action more definite on the ground that it could not be ascertained from said complaint whether the slope of the tile therein mentioned contributed to the alleged fall of the plaintiff Lydia Lamberson, or whether the alleged fall of the said plaintiff was caused only by the alleged presence of water on said tiling.

Said pleading does not fulfill the requirements of Section 5-605 of the Idaho Code of Civil Procedure, requiring that the facts constituting the cause of action be stated in ordinary and concise language, as interpreted by the Idaho decisions.

It has often been held that a general allegation of negligence is insufficient to withstand an attack on the ground of uncertainty.

King v. Oregon Short Line Railroad Co., 6 Idaho 306, 55 Pac. 665;

Crowley v. Croesus Gold & Copper Mining Co., 12 Ida. 530, 86 Pac. 536;

Younie v. Blackfoot Light & Water Co., 15 Ida. 56, 96 Pac. 193.

It is apparent from the above quoted portion of plaintiffs' complaint that it cannot be ascertained therefrom whether defendant is charged with negligence by reason of the fact that said ramp was slop-

ing, or by reason of the fact that said ramp was wet, or both. Such uncertainty must yield to a motion on the part of the defendant to make said complaint more certain, and it was clearly error to deny such motion.

Pullen v. City of Butte, 38 Montana 194, 99 Pac. 290;

Osborn v. Carey, 24 Idaho 158, 132 Pac. 967;

Stearns v. Grover, 61 Idaho 232, 99 Pac. (2d) 955.

II.

THE JUDGMENT CANNOT STAND BECAUSE THERE IS NO EVIDENCE IN THE RECORD THAT DEFENDANT:

- A. HAD ACTUAL KNOWLEDGE OF THE EXISTENCE OF A DANGEROUS CONDITION UPON ITS PREMISES, OR
- B. SHOULD HAVE KNOWN OF ITS EXISTENCE, BECAUSE OF THE PRESENCE OF A DANGEROUS CONDITION FOR A SUFFICIENT LENGTH OF TIME TO GIVE DEFENDANT CONSTRUCTIVE NOTICE THEREOF,

AND THAT DEFENDANT AFTER HAVING KNOWLEDGE OR NOTICE THEREOF FOR A SUFFICIENT LENGTH OF TIME, FAILED TO:

- A. TAKE ADEQUATE STEPS TO CORRECT SUCH DANGEROUS CONDITION, OR
- B. GIVE PLAINTIFF SUFFICIENT WARNING THEREOF.

(Arguing Specifications 2(1), 2(5), 2(6), 3, 4a, 4b, 4c, 4e.)

- A. The nature of the obligation owed by an owner or occupant of land toward an invitee has been defined by case law in almost every jurisdiction with no appreciable disparity.

The authorities are almost entirely agreed upon the proposition that an owner or occupant of lands or buildings who directly or by implication, invites or

induces others to go thereon or therein owes to such person a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils. The owner is not an insurer of such persons, even though he has invited them to enter.

20 RCL pp. 55-57, 66 *NEG* 32(1), 44;

Goldstein v. Healy, 187 Cal. 206, 201 Pac. 462;

Shanley v. American Olive Co., 185 Cal. 552, 197 Pac. 793;

Mantino v. Sutter Hospital Assn., 211 Cal. 556, 296 Pac. 76;

Blodgett v. B. H. Dyas Co., 4 Cal. (2d) 511, 50 Pac. (2d) 801;

J. C. Penney Co. v. Robinson, 128 Ohio St. 626, 193 N.E. 401, 100 A.L.R. 706-767;

Cooley on Torts, Vol. 2, p. 1259, 3rd Edition;

Sears Roebuck & Co. v. Peterson, 1935 (C.C.A. 8th), 76 F. (2d) 243;

Williamson v. Neitzel, 45 Ida. 39, 260 Pac. 689;

Pincock v. McCoy, 48 Ida. 227, 281 Pac. 371;

Hall v. Boise Payette Lbr. Co., 125 Pac. (2d) 311;

Carr v. Wallace Laundry Co., 31 Ida. 266, 170 Pac. 107;

Martin v. Brown, 56 Ida. 379, 54 Pac. (2d) 1157.

The duty cast upon an owner to an invitee is thus set forth as the duty to keep his premises in a "reasonably safe" condition.

When the Courts have said that an owner must keep his premises safe for use by an invitee they did not require of him a guaranty against any possible injury,

but only that he use ordinary care to keep his premises in a reasonably safe condition for use by an invitee.

Jones v. Bridges, 38 Cal. App. (2d) 341, 101 Pac. (2d) 91;

Brown v. Holzwasser, Inc., 108 Cal. App. 483, 291 Pac. 661;

Corbett v. Spanos, 37 Cal. App. 200, 173 Pac. 769;

Matherne v. Los Feliz Theatre (1942), 53 Cal. App. (2d) 660, 128 Pac. (2d) 59.

- B.** Furthermore, the indisputable rule of law is that no liability rests upon defendant for a dangerous condition unless he knew of it, or it had existed for a length of time sufficient to give him constructive notice.

The time-tested doctrine has been propounded by many decisions that in order to impose liability for injury to an invitee by reason of a dangerous condition of the premises, the condition must have been known to the owner or occupant, or have existed for such time that it was the duty of the owner to know of it.

F. W. Woolworth v. Williams (1930), 59 App. D.C. 347, 41 Fed. (2d) 970;

Newell v. K. & D. Jewelry Co. (1935), 119 Conn. 332, 176 Atl. 405;

Bennett v. Louisville, etc. R. Co., 102 U. S. 577, 26 L. Ed. 235;

Shanley v. American Olive Co., 185 Cal. 552, 197 Pac. 793;

Southern Paramount Pictures Co. v. Gaulding, 24 Ga. A. 478, 101 S.E. 311;

- Calvert v. Springfield Electric Light Co.*, 231 Ill. 290, 83 N.E. 184, 14 L.R.A. N.S. 782, 12 Ann. Cas. 423;
- Weber v. City Water Co.*, 206 Ill. App. 417;
- Mellish v. Thorne*, 150 Ill. App. 237;
- Chapin v. Walsh*, 37 Ill. App. 526;
- Cleveland, etc. R. Co. v. Means*, 59 Ind. App. 383, 104 N.E. 785, 108 N.E. 375;
- Wilmer v. Chicago Gr. W. R. Co.*, 175 Iowa 101, 156 N.W. 877, L.R.A. 1917F 1024;
- Louisville etc. R. Co. v. Page*, 203 Ky. 755, 263 S.W. 20;
- Gosney v. Louisville etc. R. Co.*, 169 Ky. 323, 183 S.W. 538, L.R.A. 1916E 458;
- Patten v. Bartlett*, 111 Me. 409, 89 Atl. 375, 49 L.R.A. N.S. 1120;
- Smith v. New England Cotton Yarn Co.*, 225 Mass. 287, 114 N.E. 353;
- Shaw v. Ogden*, 214 Mass. 475, 102 N.E. 61;
- Davis v. Central Cong. Society*, 129 Mass. 367, 37 Am. R. 368;
- Carleton v. Franconia Iron Co.*, 99 Mass. 216;
- Lindsley v. Stern*, 203 App. Div. 615, 197 N.Y.S. 106;
- Sullivan v. N.Y. Tel. Co.*, 157 App. Div. 642, 142 N.Y.S. 735;
- De Negro v. Christman*, 77 Misc. 147, 136 N.Y.S. 364;
- Taudte v. Snellenburg* (D. C. ED. Pa.), 34 F. Supp. 115.

In an abortive effort to show that defendant had actual knowledge of the presence of water upon the

ramp, plaintiffs introduced, over defendant's objection, the testimony of Mrs. Lydia Webb Theusen and Ethel Criddle (Tr. pp. 104, 116, 117) that one of defendant's servants was seen sweeping water away from the ramp. However, they both admitted that this activity took place after the accident had happened. The impropriety of admitting evidence of acts taken to correct a situation after an accident has happened, as well as the impropriety of admitting testimony regarding the condition of the premises at a time not related to the accident is well founded in our law. It was clearly reversible error for the Court to admit said testimony.

Great Atlantic & Pacific Tea Co. v. Lray
(C.C.A. 6), 71 Fed. (2d) 396;

Lyle v. Mezerle, 220 Ky. 227, 109 S.W. (2d) 598.

- C. There is not the slightest trace of any evidence that defendant had actual knowledge of the presence of water on the ramp. Therefore, if plaintiffs' judgment is to be sustained herein, it must be upon the ground that the water in question had remained upon said ramp for a period of time long enough to have given defendant constructive notice thereof. There is no evidence, however, upon the essential fact of how long the spot of water had remained upon the ramp or entry way.

It is submitted that judgment for plaintiffs cannot be upheld because of the complete absence of any evidence that the spot of water had remained upon the ramp for sufficient time to give defendant constructive notice thereof. The authority therefor has been expounded in many jurisdictions.

In *Campbell v. F. W. Woolworth Co.*, 117 Fed. (2d) 152, a very similar situation to the instant case was

presented. In that case the plaintiff slipped on a spot of tobacco juice on the tile floor of defendant's entry way as she departed from the store. There was no evidence of how long said spot had remained upon the floor. The Appellate Court affirmed a judgment for the defendant after trial without a jury. Although the spot was reported as dried around the edges, the Appellate Court held that the trial Court could not speculate from this, the length of time which said spot had remained on the floor, therefrom, saying:

"There is no evidence upon which the Court could have based an estimate of the length of time that the slippery spot remained in the entry way prior to the accident. It may be true as plaintiff argues, that a Court may take judicial notice that time was required for the substance to reach a dried condition around the edges. The Court should not speculate, however, on the length of time necessary for it to achieve this condition. The Court did not err in sustaining defendant's motion for judgment."

In the case of *Crawford v. Pacific States Savings & Loan Co.*, 22 Cal. App. (2d) 448, 71 P. (2d) 333, the plaintiff, an invitee in defendant's hotel, alleged his fall was caused by slipping on water on the floor of defendant's lavatory. The Appellate Court reversed a judgment for plaintiff, and in its opinion said in part:

"Contention of defendant is that judgment must be reversed for the reason that there is no evidence that defendant had actual knowledge of the said condition, or that the condition complained of has existed for so long a time that defendant is charged with notice of its existence.

We find no such evidence in the record, nor is there any evidence to show how the water got on the floor.”

“The burden of proving the negligence of a storekeeper toward a customer is upon the customer. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant.”

F. W. Woolworth Co. v. Williams (1930), 59 App. D.C. 347, 41 F. (2d) 970.

And to like effect:

Scannell v. Makison Market (1932), 131 Me. 495, 160 Atl. 777;

Sears, Roebuck & Co. v. Johnson (1937), C.C.A. 10th, 91 F. (2d) 332.

It is clearly prejudicial error for the Court to assume without any proof that defendant had knowledge or notice of a dangerous condition on its premises.

Brown v. S. H. Kress Co. (1941), C.A.A. Ga., 17 S.E. 758.

In *Gordon v. McIntosh* (1932, Tex. Civ. App.), 54 S.W. (2d) 177, the Appellate Court reversed a judgment for the plaintiff because the trial Court's instructions assumed the defendant's knowledge of a dangerous condition of its premises, a fact which was in controversy, saying that the defendants “were not required to keep the aisle or entrance way to the store

in an absolutely safe condition for the plaintiff and the public, but were required to exercise ordinary care to keep it in a reasonably safe condition." In this case the complaint of the plaintiff alleged that plaintiff's injuries resulted from slipping and falling on the ten-foot tile entrance way to the defendant's store which had been allowed to become slippery and dangerous from moisture.

In the *Lamberson* case, the defendant's contention is that the presence of water upon the ramp if any was due to snow accumulating upon the awnings and dropping upon the ramp during a thaw. (Tr. p. 131.) There is no evidence to contradict this theory of defendant, and no explanation on the part of plaintiff for the existence of said water on the ramp. It is not only unreasonable and unjust, but unconscionable to predicate defendant's liability upon circumstances created by the forces of nature, unless defendant had knowledge thereof and ample opportunity to correct such situation.

"The owner of a store must take reasonable care that his customers shall not be exposed to danger of injury through conditions in the store or at the entrance which he invites the public to use. He cannot prevent some water and mud being brought into an entrance way on a rainy day, and he is not responsible for injuries caused thereby unless it is shown that the construction of the store is inherently dangerous or that he failed to use care to remedy conditions which had become dangerous after actual or constructive notice of such conditions. That has not been shown here."

Miller v. Gimbel Bros. (1933), 262 N.Y. 107, 186 N.E. 410.

In the above case, the Court reversed a judgment for the plaintiff and dismissed the complaint where it appeared that plaintiff sustained the injuries complained of by slipping and falling in entering the defendant's department store through the revolving door, the short marble entrance was wet with the day's rainfall, and that some mud was in a corner of the revolving door.

In *Murray v. Bedell Co.* (1930), 256 Ill. App. 247, a proprietor of a store was held not liable to a customer who on a rainy day, slipped and fell on the properly constructed marble tile floor of the store's open vestibule, which though cleaned twice that day, was covered with mud and water, when it was shown that the slippery condition was one customarily found on rainy days in vestibules of this character, and on the sidewalks and premises surrounding public places.

In *Suran v. Lustic Shoe Store* (1933), 14 Ohio L. Abs. 590, where it appeared that the marble floor of the vestibule to the defendant's store, where the plaintiff slipped and fell, sustaining injuries, was slippery from some tracked-in snow that had melted, and where there was no evidence tending to show that the defendant knew or should have known of the condition, the Court held in affirming a judgment for the defendant, that the evidence would not justify a conclusion that the condition of the floor was dangerous to the extent of creating liability therefor under the circumstances.

In *Antibus v. W. T. Grant Co.*, 297 Ill. App. 363, 17 N.E. (2d) 610, plaintiff testified that he did not

see a banana peeling upon defendant's stairs when he descended. He was in the basement for 25 to 30 minutes and did not see anyone use the stairs during that time, although his back was toward the stairs and he was shopping. Upon his ascending said stairs he slipped and was injured. The Court on appeal reversed the lower Court's denial of defendant's motion for a directed verdict, saying,

“* * * It is entirely possible that the peeling may have been thrown down the stairway by some person near the railing at the top, or have gotten there in some manner unexplained by the evidence. There is no testimony that it was there for any particular period of time prior to the accident, and there is certainly nothing reasonably tending to prove that it was on the steps sufficiently long to charge defendant with knowledge of its presence. Where such is true plaintiff fails to establish one of the essentials of his right to recover, and the trial court should direct a verdict for the defendant. *Goddard v. Boston & Maine R. Co.*, 179 Mass. 52, 60 N.E. 486; *De Velin v. Swanson, et al.* (R. I.), 72 Atl. 388.”

In *Tariff v. S. S. Kresge Co.* (S.J.C. Mass. 1937), 12 N.E. (2d) 79, where plaintiff had slipped on a puddle of water close to the entrance of defendant's store, and it was not shown how long the puddle had remained at said entrance, it was held that there was no evidence to support a finding of defendant's negligence, even though the puddle was described as dirty in appearance, reddish in color, one foot wide and drying along the edge.

In the case at bar, plaintiffs unquestionably had the burden of proof to establish that defendant or its servants had knowledge of the presence of water upon the ramp or that such water had remained thereon for a length of time sufficient to give defendant constructive notice thereof, and unless this burden of proof has been carried by the plaintiffs, recovery cannot be allowed.

Powell v. L. Feibleman & Co. (La. App. 1939),
188 So. 130.

Not only did plaintiffs fail to sustain the burden of proof herein, but utterly failed to introduce *any* evidence on this essential question. Reason and authority compel two conclusions, that a judgment for the plaintiffs is not supported by the evidence, and that a reversal is required. Surmise, conjecture and speculation cannot supply what is lacking in the proof essential to the plaintiffs' case.

Montgomery Ward & Co. v. Hansen, 282 Ky.
188, 138 S.W. (2d) 357;

McKeeghan v. Kline's Inc. (Mo. 1936), 98 S.W.
(2d) 555.

Defendant offers, as impelling authority herein, the case of *Matherne v. Los Feliz Theatre* (1942), 53 Cal. App. (2d) 660, 128 Pac. (2d) 59, which is so closely analogous to the instant case as to be on all fours therewith. In *Matherne v. Los Feliz Theatre*, plaintiff had fallen upon the sloping terrazzo lobby of defendant's theatre, because of the presence of water thereon. It had been raining at the time of the accident, and some water had seeped through a crack in the marquee of

the theatre and dripped upon the floor of the lobby. Granting a judgment for defendant notwithstanding a verdict for plaintiff, the Court said:

“It does not appear, however, in viewing the evidence in such manner, that defendants knew at the time of this incident or prior thereto or at all that water dripped from the ceiling onto the floor inside the lobby, or dripped from the ceiling at all. It further does not appear that water dripped from said ceiling onto the floor of the lobby for such a length of time that defendants or any of them should have known in the exercise of ordinary care of such condition; or if they were chargeable with such constructive knowledge of such dripping of water, that they had a reasonable time before plaintiff fell within which to repair such condition or otherwise protect or give adequate warning to persons using the entrance.

* * * The burden was upon plaintiffs to show that defendants had actual or constructive knowledge of a dangerous condition of the premises which proximately caused the accident (Civil Code, Section 1981; *Gabriel v. Bank of Italy* (1928), 204 Cal. 244, 267 Pac. 544, 58 ALR 1039), and that such knowledge existed for a sufficient length of time that defendants had a reasonable opportunity to correct the condition or warn its patrons. (*Gold v. Arizona Realty Co.* (1936), 12 Cal. App. (2d) 676, 55 Pac. (2d) 1254.)”

We submit that the facts of the case at bar present even a stronger case for defendant than in the *Matherne* case for the reason that no defect of any kind is shown by the evidence, and the reason for the presence of the water upon the ramp was not sus-

ceptible to exact explanation, and clearly not chargeable to defendant.

The facts of the *Lamberson* case and the foregoing authorities compel the conclusion that the plaintiffs' judgment cannot stand because of failure of proof of:

(1) Actual knowledge of the presence of water on the ramp by the defendant, or,

(2) Existence of the water for a sufficient length of time to give defendant constructive notice thereof.

D. There was no duty upon defendant to place sand, ashes, or matting upon the ramp, because defendant had no actual knowledge or constructive notice of any dangerous condition on its premises.

(Arguing Specification of Error 2(1).)

The entire record is utterly devoid of any evidence to support the finding of the Court that defendant was negligent in this respect for:

A. There is no duty upon defendant to put sand or ashes on the ramp, and

B. There is no showing that if sand or ashes had been placed upon said ramp, that said ramp would not have been slippery, or that Mrs. Lamberson's fall would have been thereby prevented.

To predicate defendant's negligence upon the failure to place sand, ashes or matting upon the ramp, without finding that defendant knew of a dangerous condition thereon, and had reasonable opportunity to remedy it thereby is to place too great a burden upon the defendant, and one not required by law.

Smith v. Sears, Roebuck & Co. (Mo. App. 1935),
84 S.W. (2d) 414.

It was not within the power of the trial judge to speculate as to whether said ramp would not have been slippery or dangerous or that defendant would have fulfilled its duty owing to the plaintiff by the placing of sand or ashes upon said ramp. No finding of negligence can be founded upon any such *hypothetical* facts. The Court is empowered only to consider the actual facts, i.e. to consider the condition of the ramp as described by the witnesses, and to determine as a fact, whether the condition was one which afforded reasonable safety to defendant's patrons, or in other words, whether defendant had exercised ordinary care with respect to the condition of the ramp.

Nicola v. Pacific Gas & Electric Co., 50 Cal.

App. (2d) 612, 123 Pac. (2d) 529;

J. C. Penney, Inc. v. Kellermeyer (1939), Ind.

App. 19 N.E. (2d) 882.

Furthermore, there is not one scintilla of evidence in the record that by placing sand, ashes, or matting on the said ramp, that a slippery condition if any existed, would have been eliminated, or that Mrs. Lamberson's fall would have been prevented thereby. There is no evidence whatsoever, in the record, of any custom or general practice among the property owners of Idaho Falls to place sand, ashes or matting on their ramps, and therefore no evidence before the Court that the duty owing to plaintiffs by defendant required the placing of any ashes, sand, or matting upon said ramp. The finding that defendant was negligent in not so doing is clearly a finding based upon speculation and wholly without support by any evidence in the record.

To determine that defendant was required to place sand, ashes, or a matting upon the ramp in order to fulfill its duty of due care is to enter the field of conjecture, guess, and speculation.

Gold v. Arizona Realty & Mortgage Co., 12 Cal. App. (2d) 676, 55 Pac. (2d) 1254.

The finding that defendant was negligent in not placing sand, ashes, or matting upon said ramp, presupposes that defendant had knowledge of a dangerous condition existing upon said ramp. Such presupposition is without the slightest foundation in either the pleadings or the proof. Not only is there no evidence whatsoever that defendant had knowledge of a dangerous condition upon its premises which was not obvious to plaintiff, but there is no evidence that a dangerous condition if any, existed for a sufficient length of time to give the defendant constructive notice.

E. There was no duty upon the defendant to warn plaintiff wife of danger, or to place sand, ashes, or matting upon the ramp, where the dangerous condition was open, obvious and readily apparent to the plaintiff wife.

(Arguing Specifications of Error 2(1), 2(5), 2(6), 3, 4a, 4b, 4c.)

In this case the plaintiffs have offered no explanation of the presence of the water upon the premises. The only explanation is the undisputed one offered by the defendant that the weather was thawing, and that a patch of snow had fallen from the box protecting the awning to the sidewalk around the corner of the window where plaintiff had fallen. (Tr. p. 131.)

The duty to warn an invitee of dangerous conditions on the premises applies only to hidden defects and dangers and not to open and obvious defects such as a spot of water upon a ramp or sidewalk.

Lamson v. Sessions Bolt Co., 234 Ala. 60, 173 So. 388;

Geis v. Tennessee Coal, Iron & R. R. Co., 143 Ala. 299, 39 So. 301;

Farmers & Merchants Warehouse Co. v. Perry, 218 Ala. 223, 118 So. 406.

Even if all of the evidence in the record be construed in a light most favorable to the plaintiffs, plaintiffs fail to show any negligence on the part of defendant, for there was no allegation in the complaint and no evidence in the record that there was anything about defendant's premises of a dangerous nature that was not entirely obvious and as well within the knowledge of plaintiff wife as defendant.

The proper rule for application in the instant case where an invitee is injured upon the premises of the property owner, has been reiterated innumerable times in many recent cases.

"The owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier, merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property.

It is when the perilous instrumentality is known to the owner or occupant and not to the person injured that a recovery is permitted. There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant."

Mantino v. Sutter Hospital Assn., supra;

20 R. C. L. pp. 55-57;

Touhy v. Owl Drug Co., 6 Cal. App. (2d) 64, 44 Pac. (2d) 405;

Martin v. Brown, 56 Ida. 379, 54 Pac. (2d) 1157;

Batson v. Western Union Tel. Co. (C. C. A. 5th), 75 Fed. (2d) 154;

Pinehurst Co. v. Phelps, 163 Md. 68, 160 Atl. 736;

Donaldson v. Wilson, 60 Mich. 86, 26 N. W. 842, 1 Am. St. Rep. 487;

Englehardt v. Philipps, 136 Ohio St. 73, 23 N. E. (2d) 829;

Ill. Cent. R. Co. v. Nichols, 173 Tenn. 602, 118 S. W. (2d) 213;

McAfee v. Travis Gas Corp. (Tex. Civ. App.), 131 S. W. (2d) 139;

Lowe v. Salt Lake City, 13 Utah 91, 44 Pac. 1050, 57 Am. St. Rep. 708;

Dingman v. A. F. Mattock Co., 15 Cal. (2d) 622, 96 Pac. (2d) 821;

Lary v. Cleveland C. C. & J. R. Co., 78 Ind. 323, 41 Am. Rep. 572;

Jones v. Swatzel, 145 Kan. 99, 64 Pac. (2d) 555;

Gordon v. Maryland State Fair, 174 Mo. 466,
199 Atl. 519;
Hoyt v. Woodbury, 200 Mass. 343, 86 N. E. 772,
22 L. R. A. N. S. 730;
Paubel v. Hitz, 339 Mo. 274, 96 S. W. (2d) 369;
Vogt v. Wurmb, 318 Mo. 471, 300 S. W. 278;
Britz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104,
59 Am. St. Rep. 504;
Texas & Pac. R. Co. v. Howell (Tex. Civ. App.),
117 S. W. (2d) 857.

F. The doctrine of *res ipsa loquitur* does not apply to the within case.

(Arguing Specification of Error 2(2).)

The Court by finding that the ramp in question was under the exclusive control of the defendant at the time of the injury apparently attempted to apply the doctrine of *res ipsa loquitur* to the within case. An examination of the facts as well as the authorities will indicate that there is no justification for the finding of exclusive control, and consequently no justification for the application of the doctrine of *res ipsa loquitur*.

It has been set down by many cases that the doctrine of *res ipsa loquitur* does not apply to situations in which an invitee falls upon a storekeeper's premises.

Dickey v. Boggs, 345 Pa. 453, 29 Atl. (2d) 1;
Pratt v. Great Atlantic & Pacific Tea Co., 218
N. C. 732, 12 S. E. (2d) 242;
F. W. Woolworth Co. v. Ney, 239 Ala. 233, 194
So. 667;

- Dalton v. Steiden Stores*, 277 Ky. 179, 126 S. W. (2d) 155;
- Powell v. L. Feibleman & Co.* (La. App.), 187 So. 130;
- Thompson v. Giant Tiger Corporation of Camden*, 118 N. J. Law 10, 189 Atl. 649;
- Fox v. Great Atlantic & Pacific Tea Co.*, 209 N. C. 115, 182 S. E. 662;
- Bauson v. Western Union Tel. Co.* (C. C. A. Fla. 1935), 75 Fed. (2d) 154;
- F. W. Woolworth v. Williams*, 59 App. D. C. 347, 41 Fed. (2d) 970;
- Wildman v. Consolidated Gas, Electric, Light & Power Co.*, 158 Md. 39, 148 Atl. 270;
- Taylor v. Roth & Co.*, 102 N. J. Law 702, 133 Atl. 386;
- Coyne v. Mutual Grocery Co.*, 116 N. J. Law 36, 181 Atl. 314;
- Bowden v. S. H. Kress Co.*, 198 N. C. 559, 152 S. E. 625;
- Parker v. Great Atlantic & Pacific Tea Co.*, 201 N. C. 691, 161 S. E. 209;
- J. C. Penney Co. v. Robison*, 128 Ohio St. 626, 193 N. E. 401, 100 A. L. R. 705;
- Markman v. Fred P. Bell Stores*, 285 Pa. 378, 132 Atl. 178, 43 A. L. R. 862;
- Dimarco v. Cupp Grocery Co.*, 88 Pa. Super. 449;
- Tenbrink v. F. W. Woolworth Co.*, 153 Atl. 245.

The ramp in question was an area composed of tile that gave access to the doorway of defendant's store

from the public sidewalk. At the time of plaintiff's accident, and for some time prior thereto, it had been used and traversed by a considerable number of customers, other than Mrs. Lydia Lamberson, any of whom could have spilled water upon the ramp or tracked it in from the street. It was also subject and open to use by various members of the public, who in passing by the defendant's store, might be inclined to stop on the ramp and look through the windows at merchandise displayed inside. Moreover it was open to the forces and elements of weather, and subject to the falling snow which might be swept thereon by the wind or fall from the awnings.

There is no sound basis therefore, and no evidence in the record to support the finding that said ramp was under the exclusive control of defendant.

Such finding of exclusive control therefore cannot be predicated upon a complete absence of evidence. Whether or not there is exclusive control of said ramp on the part of defendant was a burden upon plaintiffs to affirmatively prove.

Mosson v. Liberty Fast Freight, 124 Fed. (2d) 448, bottom col. 1, p. 450.

Not only is the record utterly devoid of any proof of exclusive control of said ramp upon the part of defendant but common sense dictates a conclusion to the contrary.

Not only is there no basis for the finding that said ramp was under the exclusive control of defendant,

but there should have been no occasion for such finding, even if it had been supported by evidence in the record.

Said finding of exclusive control is relevant only when the doctrine of *res ipsa loquitur* is to be applied. Are we to conclude from this finding that the Court herein applied the doctrine? In the absence of a showing of any negligence on the part of defendant, that can be the only conclusion.

The rule is clearly established however and too well embodied in our law to now challenge or modify it, that the doctrine of *res ipsa loquitur* does not apply to injuries resulting from slipping or falling occasioned by the presence of a slippery substance upon the floor of a store.

Bowden v. S. H. Kress Co. (1930), 198 N. C. 559, 152 S. E. 625;

Parker v. Great Atlantic & Pacific Tea Co. (1931), 201 N. C. 691, 161 S. E. 209;

Tenbrink v. F. W. Woolworth Co. (1931) (R. I.), 153 Atl. 245;

Garland v. Furst, 93 N. J. Law 127, 107 Atl. 38, 5 A. L. R. 275;

Pinney v. Hall, 156 Mass. 225, 30 N. E. 1016;

Spickernagle v. Woolworth, 236 Pa. 496, 84 Atl. 909, Ann. Cas. 1914A 132;

Hathaway v. Chandler, 229 Mass. 92, 118 N. E. 273;

Rosen-Steinsitz v. Wanamaker (Sup.), 154 N. Y. S. 262;

Olson v. Whittborne, 203 Cal. 206, 263 Pac. 518, 58 A. L. R. 129;

Walker v. Grand Stores, 137 Atl. 563, 5 N. J. Misc. 541;

Bornstein v. White, 259 Mass. 34, 155 N. E. 661.

III.

PLAINTIFFS' JUDGMENT CANNOT STAND BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT ANY ACT OF NEGLIGENCE UPON THE PART OF DEFENDANT WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

(Arguing Specification of Error 2(3).)

The District Court, per Honorable William Healy, acting district judge, made certain findings as follows (Tr. p. 23): "That when the plaintiff Lydia Lamber-son attempted to leave the store and pass over said ramp or entrance way, as a proximate cause of the same being wet, it was due to defendant's negligence, and the absence of any ashes or sand or matting on said ramp or entrance way, she slipped and fell onto the ramp or entrance way, and as a result of said fall, broke both bones in her right forearm near the wrist, and by reason thereof she sustained some permanent disability."

Although this finding is somewhat resistant to accurate interpretation, defendant advances as a fair statement of the content of said paragraph, that the Court found either in the conjunctive or the alternative that the proximate causes of the accident were (a) the

ramp being wet and/or (b) the absence of any ashes, sand or matting on the ramp.

In support of alternative (a) above we have only the following statements in the record (Tr. p. 73):

“Q. Did anything occur when you left the store?

A. I had to open the door and as I stepped out, I took about the second step and I slipped. I seen water in the doorway as I went down. It took both my feet from under me and in order to save my hip from being broken I fell on my wrist and I broke my wrist.”

Mrs. Lamberson, upon cross-examination, gave a further statement on page 85 of the transcript to the same effect:

“Q. As you left the store when did you first observe any water in the entrance or the vestibule?

A. I went out the door and took a couple of steps and slipped. I seen the water at that time.”

These are the only explanations of the accident contained in the record. We respectfully direct the Court's attention to the fact that *Mrs. Lamberson did not say that she slipped on the water*. She did not describe the appearance, the extent or the position of the spot of water. She did not state that she stepped in the water before she fell, but only stated that she sat down in it after she fell. (Tr. p. 85.)

The ramp ran from the sidewalk to the store door and was seven feet in depth. (Tr. p. 134.) Because of the absence of any testimony that the spot of water

caused Mrs. Lamberson to slip, and because of the area of the ramp, it is reasonable to infer that a spot of water of the size vaguely described by Mrs. Lamberson (Tr. p. 85) could have been present upon the ramp without causing her to slip. It may have been in front or in back of her, or on either side, and still she could have slipped for a cause unknown, and sat upon the spot of water.

In the absence of evidence on the point, the trier of the facts was required to *infer* that Mrs. Lamberson slipped *upon* the water from her statement that she slipped and *sat* upon the water. (Tr. pp. 73, 85.)

Mrs. Lamberson also testified that when she left the store she "cut the corner pretty close" (Tr. p. 74) which suggests that her exit was made hastily. It is just as reasonable to infer that her slipping was due to her haste, or to the fact that she cut the corner, or the fact that she was close to the window (Tr. p. 74) and perhaps was off balance by reason thereof.

The Court therefore in making its finding that the plaintiff wife slipped as a proximate cause of the ramp being wet, necessarily had to balance and weigh these various inferences that may be drawn from the facts, and choose one inference as against another equally probable one. Such practice is beyond the scope of the Court's function, and such a finding based upon inference cannot stand.

In support of alternative (b) of the above there is not the faintest shred of evidence in the record. No evidence of any custom or general practice to place

ashes, sand or mattings upon store entrances was introduced, and no evidence that a wet or slippery condition upon said ramp would have been ameliorated or eliminated by so doing. This portion of the finding, therefore, is also palpably unsupportable by anything in the record.

From the foregoing it is apparent that plaintiff's did not carry the burden of proof of showing what specific alleged act of negligence was the proximate cause of Mrs. Lamberson's fall. And the fact that the Court might have *inferred* that the fall was caused by the presence of water upon the ramp or the absence of ashes, sand or matting thereon, rather than to the fact that Mrs. Lamberson "cut the corner pretty close" in making her exit, or to some other circumstance, does not enable this finding to stand.

"The burden is upon the plaintiff in an action for damages for personal injuries alleged to have been caused by defendant's negligence, to prove affirmatively the negligence alleged and that it caused the injury. *Benedict v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478. That burden is not met by proof furnished by plaintiff that defendant's negligence *may* have caused the injuries, or even that it *probably* did cause it, if it also appears from the same source, that the injuries may have been produced by some other cause for which he was not responsible." (Italics added.)

Moore v. Am. Stores, Co. (Md. App.), 182 Atl. 436;

County Commissioners of Harforth County v. Wise, 75 Md. 38, 23 Atl. 65;

Strasburger v. Vogel, 103 Md. 85, 63 Atl. 202;
Darby Candy Co. v. Hoffburgs, 111 Md. 84, 73
 Atl. 565;

Hanrahan v. Baltimore, 114 Md. 517, 80 Atl.
 312.

IV.

THE JUDGMENT FOR PLAINTIFFS MUST BE REVERSED FOR THE REASON THAT THE EVIDENCE SHOWS THAT PLAINTIFF WIFE WAS GUILTY OF NEGLIGENCE WHICH PROXIMATELY CONTRIBUTED TO THE ACCIDENT.

The evidence indicates that the spot of water was located upon defendant's ramp, about two paces from the front door. (Tr. p. 73.) The sun was shining (Tr. p. 85) and there was evidently adequate lighting in the region of the ramp. Mrs. Lamberson expressed the belief that the tile of the ramp was "slick". (Tr. p. 74.) When she went into the store, she observed the condition of the ramp and that it was dry. (Tr. pp. 74, 85.) There is nothing in the record to indicate that the presence of water upon the ramp was not an open, obvious, and apparent condition which was readily observable by plaintiff wife. The fact that Mrs. Lamberson observed that the ramp was dry when she went into defendant's store, *ipso facto* shows that if she had exercised the same care in going out of the store, she would have observed that the tile was wet. Although the entrance to the store was rather wide, the fact that she "cut the corner (of the ramp) pretty close" suggests that her exit was made with some haste. The presence of water was plain to see (Tr. p.

85), for there was enough water to get her coat "good and wet", but she failed to look at it, or failed to see it if she did look at it and was therefore guilty of contributory negligence proximately contributing to the accident and precluding her recovery of damages for her injuries.

"While it is true that the proprietor of a place of business is under a legal obligation to exercise reasonable and ordinary care to see that its premises can be used with reasonable safety by those who are invited to come thereon, this does not relieve a licensee or invitee from the duty of using a like degree of care for his own safety."

Hammer v. Liberty Baking Co. (1935), 220 Iowa 229, 260 N. W. 720;

Shorkey v. Great Atlantic & Pacific Tea Co. (1932), 259 Mich. 450, 243 N. W. 257;

Bilger v. Great Atlantic & Pacific Tea Co. (1934), 360 Pa. 540, 175 Atl. 496.

It has been held that there is evidence of negligence where a customer upon going out of a store, fails to see ice or snow upon the sidewalk or ramp leading to the doorway of said store.

Great Atlantic & Pacific Tea Co. v. Chapman, 72 Fed. (2d) 112 (C. C. A. 6);

Kass v. Glatzle (1929), 7 N. J. L. Mis. R. 1006, 147 Atl. 652.

It is clearly negligence on the part of a plaintiff to fail to see an obvious danger.

Smith v. Rexburg, 24 Ida. 176.

Because of the unique character of store entrances and their difference in composition and structure from that of the adjacent sidewalk, and store floor, a higher degree of caution and care is required of customers in such areas.

In *Buttler v. Willan* (La. App. 1940), 195 So. 663, defendant storekeeper was held not to be liable on the ground of negligence for injuries sustained by plaintiff who slipped and fell on tile flooring in the arcade at the store entrance, due to the accumulation of water from a recent rain. The Court said at page 665:

“Had she been inside the store and while walking down an aisle encountered a wet and slippery floor, we do not think that it should be presumed that she would have thought it necessary to pay any attention to the floor. But on the outside of the store proper which might from its very nature become wet from rain, especially if accompanied by much wind from the side next to Washington Street where she entered, together with the further fact that the flooring of the arcade being of smoother surface than the ordinary concrete sidewalk—she knowing this from experience, mature judgment and observation of such places—we think that unless she paid some attention to where she was walking, she would be negligent herself such as to bar recovery.”

No contention is made by plaintiffs that the presence of water upon the ramp was not an open and obvious condition. Nor is any contention made that there was anything about the structure of the premises or the lighting condition in the area of the ramp, that

would prevent the water upon it from being an obvious and readily apparent condition, and visible to plaintiff wife if she had looked where she was stepping.

Plaintiff, Lydia Lamberson, was clearly guilty of contributory negligence in failing to look where she was walking or stepping at the time she fell, or in failing to see the water if she did look.

Iden v. Zeeman Clothing Co., 50 Cal. App. (2d) 111, 122 Pac. (2d) 626;

Wills v. J. J. Newberry Co., 43 Cal. App. (2d) 595, 111 Pac. (2d) 346.

In this latter case it was said:

“It is as much negligence to fail to see that which can be observed by the exercise of ordinary care, as it is negligence not to look at all.”

Several other cases have recited the well-established rule applicable herein that an invitee has a duty to look where she is going and of seeing that which is in plain sight and that if she fails so to do she is guilty of negligence.

Jones v. Bridges, 38 Cal. App. (2d) 341, 101 Pac. (2d) 91;

Blodgett v. B. H. Dyas Co., 4 Cal. (2d) 511, 50 Pac. (2d) 801.

V.

PLAINTIFFS' LUMP SUM JUDGMENT FOR DAMAGES FOR PERMANENT INJURIES CANNOT STAND FOR THE REASONS THAT (1) THE PLAINTIFFS DID NOT PRODUCE ANY EXPERT MEDICAL TESTIMONY IN SUPPORT OF PERMANENT INJURIES, AND (2) THE COURT DID NOT DEDUCT FROM THE JUDGMENT ANY SUM REPRESENTING COMPENSATION FOR DISABILITY DUE TO A CHRONIC CONDITION ANTEDATING THE ACCIDENT FOR WHICH DEFENDANT IS NOT CHARGEABLE OR LIABLE IN LAW.

(Arguing Specification of Error 5.)

Mrs. Lamberson testified descriptively of her own injuries and disability, that she sustained a broken arm as a result of the fall (Tr. p. 77); that she had a cast on her arm for five weeks (Tr. p. 78); that she was confined to bed for two weeks (Tr. p. 78); that she suffered pain during this time (Tr. p. 79); and that she still suffered pain. (Tr. p. 80.) She further asserted that she was unable to do her house work and was confined to her home for three and one-half months (Tr. p. 79); that her grip at the present time was very poor (Tr. p. 80); and that her arm was deformed (Tr. p. 80); and that she lost sales estimated to net her \$60.00 per month for three months. (Tr. pp. 82, 83.) Mrs. Lamberson produced no medical testimony whatsoever in support of her contention that she sustained permanent injuries as a result of her fall.

Dr. Clifford M. Cline provided the only expert medical testimony upon Mrs. Lamberson's condition. He testified as a witness for defendant that he made an examination of Mrs. Lamberson's arm on June 24,

1942 (Tr. p. 119) discovering a fracture of the distal end of the radius, the styloid process. (Tr. p. 121.) Upon X-raying the arm he found the condition of the fragments to be excellent (Tr. p. 122), but observed some swelling of the wrist and some deformity thereof. (Tr. p. 122.) At that time he also noted arthritic changes in the hands and wrist joints of both hands. (Tr. p. 122.) At the time of the trial (October 15, 1942) the deformity of the wrist was the same as on June 24, 1942, the swelling was less, she had more motion in the fingers, and the evidence of arthritic changes was the same. (Tr. p. 122.) Dr. Cline testified that Mrs. Lamberson's arthritis was a definite factor in causing immobility of the wrist and fingers (Tr. p. 123), and that Mrs. Lamberson gave a history of pre-existing arthritis in the hands and wrist. (Tr. pp. 125, 126.)

There is no testimony or evidence in the record to show that Mrs. Lamberson's disability at the present time is permanent in character, and no evidence to show that she would not experience improvement in the future, nor is there any evidence to establish the extent, if any, of permanent disability Mrs. Lamberson had experienced.

There are clearly matters for expert testimony and not susceptible of definition by lay witnesses.

Based upon lay testimony, none of which was directed to nor competent to establish the nature and extent of permanent disability, the Court made its finding that Mrs. Lamberson sustained "some permanent dis-

ability'' (Tr. p. 23), and made an award of \$1750.00 for general damages, and \$195.00 for special damages. (Tr. p. 24.)

Although these sums are not itemized, it may be assumed that the award for special damages in the amount of \$195.00 was intended as compensation for the loss of earnings (Tr. pp. 82, 83) estimated at \$60.00 per month for over three months. This leaves the sum of \$1750.00 as compensation for the pain and suffering and permanent disability.

However, that portion of the judgment which is founded upon compensation for permanent disability is without foundation in the record. There is no medical evidence of permanent disability, and the testimony of Mr. and Mrs. Lamberson was not directed to that question, nor was it competent to establish permanent disability.

It has been held that a plaintiff's statement respecting permanent disability from an accident, uncorroborated by medical testimony, is insufficient to establish the fact of permanent injury.

Simon v. Toye Bros. Yellow Cab Co. (L. A. App. 1934), 152 So. 606;

Forrest E. Gilmon Co. v. Hurry, 165 Okla. 29, 24 Pac. (2d) 653;

Greyhound Lines v. Davis, 290 Ky. 362, 160 S. W. (2d) 625.

Such a judgment for damages for permanent disability cannot stand unless the question of permanent

injury is supported by positive and satisfactory evidence.

- Shuck v. Keefe*, 205 Iowa 365, 218 N. W. 31;
Louisville and N. R. Co. v. Lewis, 211 Ky. 830,
 278 S. W. 143;
Chesapeake O. Ry. Co. v. McCullogh, 236 Ky.
 647, 33 S. W. (2d) 655;
Herndon v. Waldon, 243 Ky. 312, 47 S. W. (2d)
 1047;
Klein v. Medical Bldg. Realty Co., 147 So. 122
 (La. App. 1933).

It is submitted that the portion of the judgment purporting to compensate plaintiff for permanent injuries cannot stand because there is no expert testimony in support of permanent injury, and that the testimony of Mrs. Lamberson was not competent for this purpose because it does not meet the test of the cases set forth above.

However, even if the Court deems that there is such positive and satisfactory evidence supporting the finding of "some permanent disability" (Tr. p. 23), the judgment cannot stand because the Court made no segregation or deduction of damages based upon the preexisting chronic arthritis. The judgment for damages for permanent injuries cannot stand because it must be presumed that the Court in charging defendant with liability therefor did not deduct or segregate any portion thereof as attributable to preexisting chronic arthritis of the hands and wrists contributing to the disability. The authorities overwhelmingly support the necessity of such segregation.

In *Union Oil Co. of California v. Hunt*, 111 Fed. (2d) 269, this Honorable Court on April 24, 1940, established the law for this circuit in a decision which after a review of the authorities and decisions at large including a review of the law as announced by the Idaho Supreme Court, said at page 277:

“ ‘If the facts of aggravation of injury are proved, the wrongdoer must answer for any aggravation of the plaintiff’s condition for which he is responsible, and that is the limit of his liability.’ Sutherland on Damages, Vol. 4, Sec. 1244, p. 4676. The recovery, however, must not include damages for injuries which result from the original injury, but must be confined to damages for aggravation of that condition or injury. *Jones v. Caldwell*, 20 Idaho 5, 116 Pac. 110, 48 L. R. A. N. S. 119, 121. It follows then, that the plaintiff cannot recover in this action for any injuries received prior to November 5, 1934, *Maynard v. Oregon R. R. Co.*, 46 Or. 15, 22, 78 Pac. 983, 68 L. R. A. 477. The difficulty with the situation presented here lies in the fact that much of the evidence of pain and suffering and other damages applied only to the first injury for which any right to recover was altogether abandoned during the trial—at just what stage of the proceeding is not apparent. So we have the anomaly of an award of damages for a second injury based upon improperly admitted evidence concerning a prior injury. Evidence of the first injury and damage thereunder is irrelevant for any purpose, other than to show aggravation * * * This does not preclude, however, the reception in evidence of testimony of the plaintiff’s condition im-

mediately preceding the second injury which would be admissible for the purpose of showing a base or standard for measuring the damages suffered by the plaintiff in said second injury.

“It is said in the article on Damages in American Jurisprudence:

“ ‘The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or as the rule is sometimes stated, must be certain both in their nature, and in respect of the cause from which they proceed.’ 15 *Am. Jur.* Sec. 20, p. 410.

“ ‘The damages recovered in any case must be shown with reasonable certainty both as to their nature and in respect of the cause from which they proceed. No recovery can be had where it is uncertain whether the plaintiff suffered any damages unless it is established with reasonable certainty that the damages sought resulted from the act complained of. Hence no recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause. * * * 15 *Am. Jur.* Sec. 22, p. 413.’ ”

Upon the face of the record, the Court in making its award has made no segregation between the disability due to the arthritic condition of plaintiff before the accident, and the limited consequences lawfully assignable to the accident, but the major portion of the award is compensation for disability due to the natural progression of a chronic disease, and the cure

thereof, with which defendant is not chargeable or liable in law, and therefore this judgment must be reversed.

Dated, Oakland, California,
April 26, 1943.

Respectfully submitted,
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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MONTGOMERY WARD AND COMPANY

Appellant,

vs.

CHESTER A. LAMBERSON AND LYDIA LAMBERSON

Appellees.

BRIEF OF APPELLEES

Appeal from the District Court of the United States for the
District of Idaho, Eastern Division

WILLIAM S. HOLDEN
Idaho Falls, Idaho.

WALTER H. ANDERSON
CLYDE BOWEN
Pocatello, Idaho.

Attorneys for Appellees

FILED

JUN 21 1943

PAUL P. O'BRIEN,
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STATEMENT OF FACTS

It is felt by counsel for the appellees that a concise statement of the facts of this case may be of assistance to the Honorable Court. First, in order that it may be fully advised as to the facts of the case, and for the further reason that the appellees do not agree with the short brief statement of the case in appellant's brief. (appellant's brief, p. 2, 3).

On November 26, 1941, Chester A. Lamberson and Lydia Lamberson were husband and wife and had been for many years prior to said date.

In the afternoon of November 26, 1942, at approximately 3:00 P. M., appellee, Lydia Lamberson entered appellant's store from Shoup Avenue through the third door or entrance way from the south in Idaho Falls, Idaho. There

are four entrance ways leading off from Shoup Avenue into appellant's store (Tr. P. 71, 72, 73). Lydia Lamberson entered the third door from the south (Tr. P. 72, 73). When she entered the store, there was no water on the entrance way. It was dry (Tr. P. 74).

Lydia Lamberson went into the store to do some shopping (Tr. P. 72). After being in there for approximately thirty minutes, she left the store using the same door way, that is, the same one she came in through (Tr. P. 73, 74). When she was taking the second step on the outside of the door, and while on the entrance way, she slipped on some water that was on the entrance way and fell and broke her wrist. She saw the water as she went down (Tr. P. 73). She fell near the window (Tr. P. 73). The entrance way to the store commences at the easterly edge of the sidewalk and leads into the store a distance of seven feet, and after she fell, her feet were approximately eighteen inches from the sidewalk as she laid on the entrance way. After she fell, she became very sick and experienced excruciating pain and was nauseated (Tr. P. 74). The hose on her right leg was wet above the ankle from the water on the entrance way. After falling and while still on the entrance way, someone came to the store door from the inside and asked her if she had fallen. She told him she had and was injured. He then took her back to the manager of the store and said, "Here is a lady who fell in the entrance and she thinks she has a broken arm" (Tr. P. 74).

She was taken into the store and given a drink of cold water by employees at the store who also applied cold water to her face and forehead (Tr. P. 75). After being in the store

approximately thirty minutes, she was taken in a taxicab to the office of Dr. Soderquist, of Idaho Falls, Idaho, who made an x-ray of the fractured arm, and it was while at the office of the doctor that her husband came to see her. The doctor applied a cast to her arm (Tr. P. 77, 78).

After leaving the doctor's office, she was taken to her home where she remained in bed for two weeks and after two weeks she was up and about the house, but did not do any work for three and one-half months (Tr. P. 78, 79). In addition to the broken wrist bone at the time of her falling, the plaintiff injured her back and ankle (Tr. P. 80). Prior to her injury, she was a cosmetic saleswoman, and her earnings amounted to about \$60.00 per month (Tr. P. 79).

After the cast was removed from her arm, she had a deformity in her wrist and limitation of motion and limitation of use in her wrist and arm, and she still suffers pain, limitation of motion, and deformity in her right wrist (Tr. P. 79, 80). She is unable to perform any housework that requires her to use grip or exert strength in her left hand (Tr. P. 80). Defendant's medical expert, Dr. C. M. Cline, admitted an injury of this type to be very painful (Tr. P. 124). And that there was a permanent loss of flexibility and mobility in the wrist and fingers of approximately twenty-five percent (Tr. P. 121, 122, 123). Said expert further testified that the same deformity existed in the wrist at the time of the trial as existed on June 24, 1942, when this expert examined Mrs. Lamberson by agreement of counsel (Tr. P. 121, 122). Further defendant's medical expert testified that one could have a severe fracture and an arthritic condition following,

that never existed before the fracture (Tr. P. 125). And that from this expert's examination, Mrs. Lamberson had sustained a definite fracture of a bone in the right forearm close to the wrist joint (Tr. P. 127).

There is definite evidence that the entrance way was dry when Mrs. Lamberson entered appellant's store (Tr. P. 73, 85, 86). There was no snow on the sidewalk in front of the entrance way to the store (Tr. P. 87).

There is definite evidence from at least two disinterested witnesses who entered Montgomery Wards Store on the same day, and through the same entrance that Mrs. Lamberson was injured on, not more than a few minutes after Mrs. Lamberson fell, that water was being swept out of the same entrance way. The weather of the afternoon of the accident was fair and the sun was shining brightly. These two witnesses, Mrs. Ethyl Criddle and Lydia Webb Thuesen, and it is to be recalled that Mrs. Lamberson entered the store about 3:00 P. M. (Tr. P. 73) and remained in the store about thirty minutes, these witnesses entered the store sometime between 3:30 and 4:00 P. M. (Tr. P. 102, 103, 114). And at this time, which could only be a few minutes after Mrs. Lamberson was injured, both witnesses, Criddle and Thuesen, stopped on the sidewalk while the employee was sweeping water out of the entrance way as they went in (Tr. P. 103). "Q. I asked what the fact was as to whether you saw water in the entrance way when you went in the store. Did you see any water in the entrance way as you went in? A. We had to kind of stop on account of a man sweeping there" (Tr. P. 103, 114). "Q. When you and Mrs. Criddle went into the store,

did you have an difficulty getting in? A. We had to kind of stop so as not to get the water splashed on us. Q. Can you fix the time it was exactly? A. No, Sir, I can't. Q. Can you tell whether it was before or after Mrs. Lamberson fell? A. Yes, Sir, it was after" (103, 114, 116). There was quite a bit of water in the entrance way at this time, (Tr. P. 117) right in front of the door (Tr. P. 117).

At the time this accident occurred, Montgomery Ward and Company occupied all of the ground floor (Tr. P. 110). There was no rubber matting on the tile in the entrance way at the time this accident occurred about 3:30 in the afternoon (Tr. P. 85). Mrs. Lamberson saw the water in the entrance way (Tr. P. 85). She got her coat and clothing wet when she fell Tr. P. 85). The entrance way where the accident occurred has a rise in it or slopes one-seventh of an inch to every twelve inches (Tr. P. 133). Appellant's witness Miller admitted that there was no rubber matting, or sand, or ashes on the tile entrance way when this occurred (Tr. P. 134). And also that he did not know whether or not the entrance way at the point where the accident occurred was wet or dry at the time Mrs. Lamberson was injured (Tr. P. 138).

After counsel for defendant appellant moved to strike the testimony of witnesses Thuesen and Criddle, he brought out on cross examination the following: "Q. When you went in what was the condition of the entrance? A. Quite a bit of water on there. Q. Over the whole area? A. Right in front of the door was all. Q. There was someone sweeping it out, you say? A. Yes, Sir. Q. Can you say whether that was before

or after Mrs. Lamberson fell? A. It was after according to the time she was there" (Tr. 117, 118). Defendant appellant's expert testified reagarding Mrs. Lamberson's injury as follows: "Q. When you examined Mrs. Lamberson on the 24th of June, 1942, please state what you found relative to Mrs. Lamberson's physical condition. A. She gave me a history on November 26th of slipping and falling at the entrance of the Montgomery Ward Store, and that she had injured her right arm, back at that time. A fracture of the distal end of the radius, the styloid process. We x-rayed this arm at that time and found the position excellent. She said also that her back was strained, but now recovered. She had some swelling in that wrist joint; some limitation of motion; also unable to completely flex the fingers; some deformity at the wrist; was nervous for three months after the injury; tonsils out; teeth bad; throat negative; heart negative; blood 120 over 80; reflexes negative; back normal; some arthritic changes in the hands and wrist joints in both joints; urinalysis made." Further "A. I would say that this is a little difficult to remember, but I would say that the deformity is the same as it was; that the swelling is less; that she has more motion in the fingers than she had at the last examination; that the existence of arthritic changes are about the same" (Tr. P. 121, 122). Further "Q. What I had in mind, Doctor, was how close to the end of the radius where it joints the wrist bone was the fracture? A. Very close. Q. Isn't it true that frequently where you have a fracture so close to the joint that a thickening of the synovial membrane causes stiffness of the joint? A. Very often (Tr. P. 124). Q. If Mrs. Lamberson never had any pain or suffering from pain until after this

fracture, isn't it your opinion that the fracture would be the inciting cause of her pain? A. Yes. I questioned her, however, and she did give some prior history of arthritis (Tr. P. 125). Q. Thickening of the joints, or membrane would cause pain and loss of mobility? A. Yes, Sir" (Tr. P. 126). Defendant's witness, G. W. Miller, store manager for Montgomery Ward and Company at the time this occurred, testified: "Q. Did you inquire how she happened to sustain this injury? A. I don't remember whether I did or not (Tr. P. 129). Q. Subsequent to that time, what did you do relative to examining the premises? A. Well,----- Q. I mean particularly at the entrance. A. Mrs. Lamberson had left the store when I went and got one of my assistants, Mr. Molen, and I asked Mr. Molen to accompany me to the vestibule to see the condition of the place where she claims she fell. I got another man, Mr. Tracy, who picked up Mrs. Lamberson. We examined the vestibule and it was perfectly dry, as far as the vestibule was concerned, but the sidewalk was wet. It was thawing. We had our janitor clean off the sidewalk several times using a broom" (Tr. P. 130, 131). Quare. If the manager of the store did not inquire how Mrs. Lamberson was injured, it seems strange that he would immediately make an examination of the vestibule leading into the store. "Q. At the time that Mrs. Lamberson was injured, was there any rubber matting, sand, or ashes on this tile? A. No, Sir" (Tr. P. 134-135).

Mrs. Lamberson denied having told Dr. Cline anything about ever having had arthritis. "Q. Directing your attention to June 24, 1942, when you went up and was examined by Dr. Cline, what was the fact as to whether you told him any-

thing about having an arthritic condition, or arthritis? A. I never told him anything'' (Tr. P. 151).

This case came on for trial before the Honorable William Healy, Circuit Court Judge, sitting at the October, 1942 term, on October 15, 1942, without the intervention of a jury; defendant having demanded trial before the Court sitting without a jury (Tr. P. 20).

On October 20, 1942, the Court filed its opinion and on October 28, 1942, Judgment was filed in the sum of \$1,945, lawful money of the United States of America, and costs in the sum of \$36.00.

Hence appellant's appeal to this Honorable Court.

AGUMENT

I.

(We will refer to the parties with respect to the position they occupied in the court below, and that is, as "Plaintiff" and "Defendant".) Under this point we will attempt to answer Argument I (Page 7, Appellant's Brief.)

We do not understand how appellant can take the position that the Idaho law, with reference to pleading and practice, controls in this case. It is difficult for us to understand appellant's position. It will be noted that throughout, nothing but Idaho cases are cited. Our understanding is that when the Congress authorized the Supreme Court of the United States to promulgate the rules of practice, that that was the exclusive rule in the Federal Courts, and it is difficult for us to follow counsel in the position they take that the Idaho statutes and decisions control the rules of procedure in the Federal Courts. Rule I. provides that "The Federal rules shall govern the procedure in the District Courts." These rules have the force and effect of Federal statutes.

John R. Alley & Co. vs. Federal National Bank of Shawnee, 124 F. 2d 995.

The Act of Congress itself provides that, "The Supreme Court of the United States shall have the power to prescribe, by Federal rules, for the District Courts of the United States * * *, the forms of process, returns, pleadings, and motions, and the practice and procedure in civil actions at law." Act, June 19, 1934, Chap. 651.

We invite the Court's attention to Form No. 9 prescribed by the Supreme Court of the United States. Then aside from all of that, we invite the Court's attention to the Bill of Particulars supplied (Tr. P. 14). We deem it wholly unnecessary to take up any more of the Court's time in dealing with the proposition that is so utterly unfounded.

II.

Passing to the Point No. II (Appellant's Brief, page 10) it is there stated that the defendant is not liable because it had no actual knowledge of the existence of the dangerous condition upon its premises, or should have known of the existence by the elapse of reasonable length of time.

First, it is clear from the reading of the record in this case and the evidence of the witnesses, Criddle and Theusen (Tr. page 101 et seq.) that this water was put on this entrance by some employee of the defendant after Mrs. Lamberson entered the store and before she came out, and it is an elementary proposition of law, and it would seem that there could be no dispute about it, that negligence may be proved by circumstantial evidence to the same extent as any other issue in a civil or criminal case might be proved. All of the circumstances here clearly point to the fact that this water was put on this entrance by some employee of the defendant. Then the defendant was charged with notice of its presence there. It was an act of negligence within and of itself to put the water there, and not put sand or ashes or some other substance or give warning to prevent it from becoming a snare and trap.

Nobody contends that a store owner or other proprietor of a business establishment where the public is invited, is insurer, but the liability is predicated upon negligence; Circuit Judge Healey, sitting without a jury, found negligence here and in which he is amply sustained by the evidence.

Now, as to the knowledge of the presence of this water, of course, our contention is that the defendant negligently put it there; and in this connection, we invite the Court's attention to the case of *Sears Roebuck & Company vs. Peterson*, 76 F. 2nd 243, wherein it is said:

"But it is urged by defendant that there was no proof that defendant had knowledge of the presence of the twine upon the floor, or that it had been upon the floor for such a length of time as to charge it with constructive knowledge. This is not a case in which the condition was attributable either to the elements or the acts of some third party. The negligence here complained of was that of the defendant itself, committed, it is true by its employee. It would be an anomaly to hold that one is not to be charged with notice of a condition arising from his own active negligent act or that there must be proof of knowledge or notice of a dangerous condition created by the negligent act, or omission of the owner of the premises it is universally held that the owner of the premises is charged with notice of any structural defect in his property, on the theory that one must be charged with notice of his own act, and hence, whenever defective conditions are due to the direct act of the defendant or of persons whose acts are constructively his own, no notice need be shown but is necessarily implied."

The Supreme Court of California held:

"Where dangerous or defective condition of property

which causes injury to invitee has been created by negligence of the owner or his employee acting within the scope of the employment, owner cannot assert that he had no notice or knowledge of such condition, but knowledge is imputed to him."

Hatfield vs. Levy Bros. 117 Pac. 2d 841.....
Cal.

In Hatfield vs. Levy Bros., in course of the opinion it was said:

"Defendants urge that there is not sufficient evidence to establish that defendants had notice, actual or constructive, of the dangerous condition of the floor and that therefore the judgment must be reversed. There are several reasons why that contention cannot prevail. There is evidence heretofore referred to by defendant Scott, the employee who spread the wax on the floor, that after it was applied on the morning of the accident, the floor was slippery. He thus knew it was slippery and, therefore, dangerous; his negligence had brought about the condition. Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances, knowledge thereof is imputed to him. Saunders vs. A. M. Williams & Co., 155 Or. 1, 62 P. 2d 260. Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the

owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care, to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it."

Again it has been held:

"Where the slippery condition of the floor is caused by oiling or washing done by defendant, then knowledge of the slippery condition is imputed to defendant, since the jury may properly infer that the condition resulted from the defendant's own act. *Busby vs. Southwestern Bell Telephone Co.*, *supra*. In that case plaintiff was an employee to whom defendant owned the duty of reasonable care, and while she was on her way to a restroom downstairs, her foot slipped or turned back under her so that she fell while descending the stairs. One of the allegations of negligence was that the steps were wet and slippery from recent washing, and the defendant claimed that in the absence of evidence that it had knowledge of the wet condition of the steps, a verdict for plaintiff could not be sustained. The court affirmed the giving of an instruction omitting this requirement."

Saunders vs. A. M. Williams & Co., 62 P. 2d 260 at page 265; 155 Ore. 1.

Now, then, what are the facts which these unquestioned and unquestionable principles of law apply to and govern in this case. They are, that when Mrs. Lamberson went through the entry way where she was injured, it was dry. It is not disputed that when she came out, it was wet (Tr. pp. 73, 74).

It is clear that between the time she went in and came out, some employee of the defendant put some water on this ramp to wash it. We submit that no other inference is permissible under this case. Then having done so, it became the duty of the defendant and its employees to warn Mrs. Lamberson of that condition. This duty they did not perform. The failure of this duty is negligence. It is true that no eye witness saw this water put on, but all of the circumstances surrounding the entire transaction unerringly point in that direction. We know that the plaintiff went over a dry ramp going in she came out and fell on a wet one. Then it is clear from the evidence of the witnesses, Criddle and Theusen, that after she had fallen, some employee of the defendant began sweeping up the water. This was an inference for the Trial Court to draw, and Judge Healey performed that function.

Would counsel have us believe that some trespasser or some interloper went up to the entry way of Montgomery Ward & Company and put water on it then sweep it out? The law is clear that negligence in these cases may be proved circumstantially. That is so held in *Sears Roebuck & Company vs. Peterson*, *supra*; *Hatfield vs. Levy Bros.*, *supra*.

The court, in *Sears Roebuck & Company vs. Peterson*, said, "In the instant case there is little room for the speculation that some third party might have placed this twine where it was found. All of the proven circumstances are inconsistent with such a conclusion." 76 F. 2d 247, Syl. No. 7 in opinion.

If some employee of the defendant put this water on this entrance, then no notice to the defendant was required because the knowledge of the employee who put the water thereon

is imputed to the defendant. "Where slippery condition of floor causing injury to invitee is produced by an agent or servant of invitor, no notice of danger need be brought home to invitor to render it liable for injuries sustained by invitee." Westbrook vs. Onondaga Company, 36 N.Y.S. 2d 494.

See also, Philips vs. Montgomery Ward & Co. 125 F. 2d. 248;

Nicola vs. Pacific Gas & Electric Company, 123 Pac. (2d) 529.....Cal. Appeals 2d.....;

Lorenz vs. Santa Monica City High School District, 124 Pac. 2d 846.....Cal. Appeals 2d.....;

Kellogg vs. H. D. Lee Mercantile Supply Company, 160 S. W. 2d 838.....Mo. Appeals.....;

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Safeway Stores vs. Whitehead, 125 Pac. 2d 194,Okla.....;

Parker vs. Jordan Marsh Company, 37 N. E. 2d 465,.....Mass.....;

Marano vs. Jensen, 29 N.Y.S. 2d 346.

Wherein it is held, "The plaintiff was entitled to recover for accident resulting from slippery condition of vestibule in defendant's premises caused by tracking in of snow and slush by people visiting defendant's house."

See also, *Clapper vs. Zubres*, 24 N.Y.S. 2d 377; 261 App. Div. 850.

So it is seen that all there was in this case was a question of fact and the learned Circuit Judge who sat in the Trial Court has decided that question, and it is submitted that this court will not distrurb the finding.

We urge upon the court to bear in mind that the Trial Judge heard this evidence, saw all of the witnesses, and made his findings of fact and conclusions of law. We doubt that it is necessary for us to point out any of the rules of law pertaining to findings, but we do so in order that we may discharge that full measure of duty that we owe to our clients. In this connection we beg the indulgence of the court to allow us to urge that findings will not be disturbed on appeal if they are supported by sufficient evidence. That this Honorable Court will not weight the evidence, but must accept the findings made by the Trial Court unless no reasonable man could draw the conclusions that the Trial Court did from the evidence.

Occidental Life Insurance Co., vs. Thomas. 107 F. 2d 876.

Under the Federal rules a finding of fact cannot be set aside unless it is "clearly erroneous" in that it is against the clear weight of the evidence.

United States vs. State Street Trust Company, 124 F. 2d 948;

Fidelity & Deposit Company of Maryland vs.

Aberdeen National Bank & Trust Company, 124 F. (2d) 973;

Wittmayer vs. United States, 118 F. 2d 808;

Andrew Jergens Co. vs. Conner, 125 F. 2d 686;

McIntosh vs. Wiggins, 123 F. (2d) 316;

Corbett vs. Halliwell, 123 F. (2d) 331;

Walker vs. Lightfoot, 124 F. (2d) 3.

Gates vs. General Casualty Company of Am. 120 Fed. (2) 925, 927. We quote:

“Appellant’s contend that the Court’s finding of misrepresentation and concealment is not sustained by the evidence. On this issue, appellants must show the Court findings ‘are clearly erroneous’, due regard being given to the opportunity of the trial Court to judge of the credibility of witnesses, all but one of whom was heard by the Court.” See also:

Gary Theater Company vs. Columbia Pictures Corporation (7th Cir.) 120 Fed. (2) 891.

“There is sharp conflict in the evidence; and of course it is not incumbent upon this Court to reconcile such conflict or to weight evidence; our sole duty is to determine whether there is any substantial evidence to support the findings of the Court below.” This from the opinion in:

Babbitt Brothers Trading Company vs. New Home

Sewing Machine Company 62 Fed. (2) 530,
533.

Gray vs. United States, (8th Cir.) 109 Fed. (2)
728;

Southern Railway—Carolina Division vs. Bennett
233 U. S. 80; 58 L. Ed. 860, 34 S. Ct. 566. j

“The contention that the verdicts are against the weight of the evidence cannot be considered, as this Court can go no further than to determine whether there is substantial evidence to support them. Nor is it the providence of this Court to determine whether the verdicts are excessive. That question lay with the Court below upon the motion for a new trial.” trial.” Quoted from:

Grand Trunk Western Railway Company vs.
Heatlie 48 Fed. (2) 759.

III.

As to whether or not the plaintiff, Lydia Lamberson, was guilty of contributory negligence was purely a question for the Trial Court and is not a question of law at all. The rule of law in the State of Idaho is that contributory negligence is generally a question of fact for a jury, or judge trying a case without a jury, and becomes one of law warranting non-suit only when the plaintiff's evidence is reasonably susceptible of no other interpretation than that his conduct contributed to

his injury and that he did not act as a reasonably prudent person should have under the circumstances.

Donovan vs. Boise City, 171 Pac. 670; 31 Idaho 324.

Again the Supreme Court of Idaho held that a person injured will not be precluded from recovery because of contributory negligence unless it was such that upon consideration of all facts and circumstances as they appeared at the time in question, a reasonably prudent person would not have acted as did the injured party, and only when it appears upon the undisputed facts that a reasonably prudent person would have acted differently does contributory negligence become a question of law.

Osier vs. The Consumer's Company 41 Ida. 268
239 Pac. 735.

Whether an invitee, walking into elevator shaft was within invitation and guilty of contributory negligence held a question for the jury:

Williamson vs. Neitzel 45 Ida. 39; 260 Pac. 735.

In the case at bar, the plaintiff walked over the same entrance way and entered defendant's store through the door out of which she was leaving, being a short time before she was injured. After transacting the business in the store, doing shopping, she attempted to leave by the same door through which she had theretofore entered. When she went into the store, the ramp or entrance way was dry. When she came out, a matter of thirty to forty minutes later, the ramp or entrance

way was wet. Just how can it be said that she was guilty of contributory negligence?

See:

Bennett vs. Deaton 68 Pac. (2) 895, 57 Ida. 752;
Adkins vs. Zalasky 81 Pac. (2) 1090, 59 Ida.
292;

Baldwin vs. Mittry 102 Pac. (2) 643, 61 Ida. 427;

Mere lapse of memory or forgetfulness is not contributory negligence as a matter of law:

MacKenna vs. Grunbaum 33 Ida. 46, 190 Pac.
919;

Davis vs. Pacific Power Company 40 Pac. 950, 107
Cal. 563, 48 Am. St. Rep. 156;

Flack vs. Fikes 267 Pac. 1907, 204 Cal. 329;

Adkins vs. Zalasky, Supra.

Griffin vs. City of Lewiston 6 Ida. 231, 55 Pac.
545.

There can be no contributory negligence without preceeding or concurring negligence on the part of the other party.

Rogers vs. Davis 228 Pac. 330, 39 Ida. 209.

Defendant attempts to explain the existance of the water upon the entrance way by reason of snow accumulating upon the awnings and dropping upon the ramp during the thaw,

or that the water was due to a patch of snow that had fallen from the box that protected the awning to the sidewalk, around the corner of the window where plaintiff had fallen, (defendant's brief p. 17, middle paragraph; also defendant's brief P. 24, at the bottom of the page).

Let us examine the evidence as to this matter.

From defendant's own witness, G. W. Miller, (Tr. P. 131) we quote, "Q. Was there any snow on the sidewalk? A. No snow visible with the exception of one place, a small patch around the corner of the window where Mrs. Lamberson fell that had fallen off the eaves. It was a new patch of snow, probably one foot square and no one had stepped in it, we noticed that particularly. Q. Had this splashed into the vestibule? A. No, Sir, it was south of the vestibule. Q. How far south? A. A good two feet. We have a small box built over the awning to protect the awning when it is rolled up. That box had the snow on and when it thawed, that snow fell off. We had our man out to clean the sidewalk several times that day."

This, then, would seem to eliminate entirely defendant's contention that Mrs. Lamberson slipped in the snow. The snow was on the sidewalk and Mrs. Lamberson fell in the ramp or entrance way that was enclosed from three sides. And from the above testimony of defendant's own witness, the snow had not been stepped in.

Discussing defendant's point 5 appellant's brief PP 39)

Point 1 and we quote (1) "The plaintiff did not produce any expert medical testimony in support of permanent injuries" Let us see from an examination of the testimony produced in this matter whether there was any evidence as to permanent injury or not. And we quote from defendant's medical expert ". . . she has some swelling in that wrist joint, some limitation of motion, also unable to completely flex the fingers. Some deformity at the wrist," (Tr. p. 122).

"Q. What flexibility is in the wrist and fingers?

A. About 75 %. The fingers are better than that.

Q. Would you say that if she didn't have arthritis, that she would have full mobility in her wrist and fingers?

A. I cannot answer that positively. I think arthritis is a definite factor," (Tr. P. 123).

Q. "And further, Doctor, will you look at her arm and wrist?

A. You mean examine her arm now?

Q. Yes.

A. I would say that this is a little difficult to remember, but I would say that the deformity is the same as it was; that the swelling is less; that she has more motion in the fingers than she had at the last examination; that the evidence of arthritic changes are about the same," (Tr. p. 122).

Q. This condition existing in Mrs. Lamberson's wrist, isn't it possible that this injury led to all this trouble?

A. I would say that if she had prior arthritis, that this injury might create a more severe condition.

Q. Is it true that one could have a fracture and an arthritic condition follow that they had never had before?

A. Yes, I think that is pretty far-fetched, but I think anything could happen and be true in connection with a fracture.

The plaintiff Mrs. Lamberson, regarding this injury testified:

Q. Is the right wrist as strong as it was before?

A. No sir, it is very, very poor, I cannot peel vegetables even now.

Q. Do you have as much grip as you had before you were hurt?

A. No sir, I haven't.

Q. Prior to the time you were injured was the wrist deformed or straight?

A. It was straight.

Q. Since your injury what is the condition?

A. I have a badly deformed arm.

Q. Prior to the time you were injured were you able to do your housework?

A. All my life I did my own work. I never had a hired girl more than ten days.

Q. What is the fact as to whether you suffer any pain in the right wrist at this time?

A. I suffer all the time.

Q. And what is the fact as to whether you suffered any pain in the right wrist prior to the time you hurt it?

A. I never did.

Q. And do you have pain now?

A. I have not been free from pain since I broke it. I still suffer pain.

It is to be remembered that the plaintiff Mrs. Lamberson denied giving Dr. Cline any history of having suffered from an arthritic condition, (Tr. P. 151).

Opinion evidence by an expert, can never destroy a question of fact, and opinion evidence is not binding upon a trier of facts. As to whether opinion evidence will be accepted or rejected is for the trier of facts.

Evans vs. Cavanagh, 73 Pac. (2) 83, 58 Ida. 324;

Ninstad vs. Wenton Lbr. Co. 99 Pac. (2) 52, 61 Ida. 1;

So. Pac. Co. vs. City of Los Angeles, 55 Pac. (2)
847, 5 Cal. (2) 545;

20 Am. Jur. 1059, Sec. 1208;

Anderson vs. B&O Ry. Co., 96 Fed. (2) 796;

10 C. J. 972, Sec. 228;

22 C. J. 728;

The Supreme Court of the United States, in dealing with opinion evidence generally, speaking through Mr. Justice Cardoza said:

"But plainly opinions thus offered, even if entitled to some weight have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally whether addressed to a jury (citing authorities) or to a judge (citing authorities) or to a statutory board."

Dayton Power & Light Co. vs. Public Utilities
Commission 292 U. S. 290: 54 S. Ct. 647; 78
L. Ed. 1267.

See also:

10 Cal. Jur. 972.

Counsel for the defendant have cited to this Court in their brief (page 43) the case of Jones vs. City of Caldwell 20 Ida. 5, 116 Pac. 110. And from that case we quote:

"The action of the court in refusing to give the following instruction requested by the plaintiff is assigned as error: 'If you find from the evidence that the plaintiff was caused to fall by a defect in the side-

walk negligently permitted to exist by the defendant, the defendant is responsible for all ill effects which naturally and necessarily follow the injury in the condition of health in which plaintiff then was at the time of such fall, and it is no defense that such injury may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent disease the injuries were rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent disease the injuries were rendered more serious to her than they would have been to a person in robust health.' That instruction contains a correct statement of the law upon the subject there involved, and upon the evidence introduced on the trial the instruction should have been given. A person or corporation has no more right to negligently inflict injuries upon a sick person than upon a well person, and the existence of latent disease brought into activity by a fall or other injury would not constitute a defense to an action recover damages for such injuries.' '

Jones vs. City of Caldwell, *supra*.

It is not in any degree admitted by the plaintiff that she was suffering from, or was afflicted with, any latent disease, such as arthritis, and to the contrary is by her denied. But due to the many cases cited by the defendant, none of which are in point supporting defendant's position, counsel for plaintiff felt it their duty to discuss this point briefly with this Honorable Court.

In view of the above evidence, testimony that was before the Court in this case, at the time of the trial, which the trier of facts saw and heard, the statements of counsel for the defendant commencing (Appellant's brief page 39) to the end of the brief, does not seem to be supported either by the testi-

mony in the case at bar, and certainly not by the law that appellant cites in their brief.

It would not require any expert to detect a deformed, badly bent arm and wrist. Mrs. Lamberson displayed her injured arm to the court, during the trial, without objection, (Tr. P. 80) and the deformity of the arm, and loss of 25 % in the wrist and arm were testified to by appellant's medical expert, Dr. Cline. And Mrs. Lamberson testified as to the pain she had undergone since the moment of injury, and was still suffering at the time of the trial. And a bill for medical treatment in the amount of \$45.00, (Tr. P. 96). And Dr. Cline further testified that if she had not suffered any pain before the fracture, that the fracture would be the inciting cause of pain (Tr. pp 121 et seq).

We most earnestly submit that appellant's contention that the Trial Court was in error in fixing the amount of recovery, in the manner that he did, is utterly without merit and that the cases cited by appellant's counsel in support of their contention are not in point and do not support the the contention of counsel for which they are cited.

We feel confident that this Honorable Court will bear in mind that there was no request of any kind made to the Court that itemized findings of damages be made. And further in appellant's motion for a new trial (Tr. pp 34 et seq) it did not assign as error the failure of the Court to itemize its findings of damages, or segregation of one portion from the other. The first appallee hears of this alleged error, and the first time

that it is raised is before this Honorable Court, appellant's brief page 39.

That appellees judgment should in all things be affirmed, for which the foregoing is most respectfully submitted.

Dated at Pocatello, Idaho June 6, A.D., 1943.

WILLIAM H. HOLDEN,
Residing at Idaho Falls, Idaho.

WALTER H. ANDERSON

CLYDE BOWEN
Residing at Pocatello, Idaho.

Attorneys for Appellees.

No. 10,378

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MONTGOMERY WARD & Co.

(a corporation),

Appellant,

vs.

CHESTER A. LAMBERSON and LYDIA

LAMBERSON,

Appellees.

Upon Appeal from the Judgment of the District Court of the
United States for the District of Idaho, Eastern Division.

APPELLANT'S CLOSING BRIEF.

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FILED

JUL 15 1943

PAUL P. O'BRIEN,
CLERK

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REPORT

ON THE PROGRESS OF THE WORK DURING THE YEAR 1881

BY THE SECRETARY OF THE BOARD OF AGRICULTURE

AND

THE

COMMISSIONERS

OF AGRICULTURE

AND

FOREST

IN THE

STATE OF

NEW YORK

1882

ALBANY:

1882

No. 10,378

IN THE
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LAMBERSON,

Appellees.

Upon Appeal from the Judgment of the District Court of the
United States for the District of Idaho, Eastern Division.

APPELLANT'S CLOSING BRIEF.

I.

Answering appellees' first argument which challenges appellant's right to cite Idaho case and statute law as a test of the adequacy of the complaint herein, it is sufficient to quote the Conformity Act of 1872, 28 U.S.C.A. 274:

"The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of

the State within which such district courts are held, any rule of the court to the contrary notwithstanding.”

Congress did not in terms abolish the Conformity Act by granting to the Supreme Court the power to prescribe Federal Rules, and repeals by implication are not favored.

Simkins, Federal Practice, page 5;

United States v. Jackson, 302 U. S. 628, 58 S. Ct. 390.

A comparison of Section 5-605 of the Idaho Code and Rule 8(a) of the Federal Rules of Civil Procedure will show that they are not inconsistent.

Section 5-605 of the Idaho Code provides:

“Contents of the Complaint: The complaint must contain:

2. A statement of the facts constituting the cause of action in ordinary and concise language.”

While Section 8(a) of the Federal Rules provides:

“Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter claim, cross-claim, or third-party claim, shall contain * * *

(2) A short and plain statement of the claim showing that the pleader is entitled to relief. * * *”

It is apparent, therefore, that the law of Idaho is still applicable as a test of the adequacy of the complaint, since the Federal Rules of Civil Procedure did not repeal or abrogate local rules not inconsistent

with the general rules and in effect at the time of their passage.

Stockton v. Consolidated Feldspar Corporation
(D. C. E. D. Tenn. N. D. 1940), 1 F. R. D.
411.

II.

Appellees' second argument and citations of authority in support thereof are based solely upon the premise that "this water was put on this entrance by some employee of the defendant after Mrs. Lamberson entered the store and before she came out." (Appellees' Br. p. 10.) Unless this premise is sound, the entire argument and supporting authorities must fall.

Appellees, in order to establish this premise, have relied upon the testimony of their own witnesses Criddle and Theusen. (Appellees' Br. p. 10.) In order to demonstrate the transparency of the appellees' argument and the fallacy of their contention that water was placed upon the ramp by appellant, it is only necessary to examine the actual testimony of these witnesses.

There is no question but that the two witnesses, Ethel Criddle and Lydia Webb Theusen made substantially the same observations, because they were together on the day of the accident (Tr. p. 102); they entered the store together (Tr. p. 103); both noticed a man sweeping water out of the doorway at that time (Tr. p. 103) and both left the store together. (Tr. p.

104.) Mrs. Criddle was unable to fix the exact time they went into the store and saw the water being swept out except that it was between 3:30 and 4:00 p.m. However, Lydia Webb Theusen fixed the time as definitely after the accident (Tr. p. 116):

“Q. When you and Mrs. Criddle went into the store did you have any difficulty in getting in?

A. We had to kind of stop so as not to get the water splashed on us.

Q. Can you fix the time it was exactly?

A. No, sir, I can't.

Q. Can you tell whether it was before or after Mrs. Lamberson fell?

A. Yes, sir, it was after.”

(Tr. p. 117):

“Q. There was someone sweeping it out, you say?

A. Yes, sir.

Q. Can you say whether that was before or after Mrs. Lamberson fell?

A. It was after, according to the time she was there.”

It is evident that appellant's precautions taken after the accident in sweeping away any water to prevent a recurrence of such accident were inadmissible to show negligence.

Davidson S. S. Co. v. U. S., 142 F. 315. Aff'd.
27 S. Ct. 480, 205 U. S. 187;

Columbia & P. S. R. Co. v. Hawthorne, 12 S.
Ct. 591, 144 U. S. 202, 36 L. Ed. 405;

Motey v. Pickle Marble & Granite Co., 74 F.
155;

A. T. & S. F. R. Co. v. Parker, 55 F. 595;
Barber Asphalt Paving Co. v. Odasz, 60 F. 71;
Isaacs v. S. P. Co., 49 F. 797.

The general rule is clear that evidence of a condition existing after an injury is inadmissible to establish the existence of that condition at the time of the injury.

Oklahoma Natural Gas Co. v. Ross (C. C. A. 10th, 1942), 131 F. (2d) 238;
 20 *Am. Juris.*, Section 306;
Haddon v. Snellenburg (Pa. 1928), 143 Atl. 8;
Lee v. Meier and Frank Co. (Or. 1941), 114 Pac. (2d) 136;
Midco Oil Co. v. Hull (Okla. 1938), 75 Pac. (2d) 1126.

The Court did not make a finding that appellant or its servants placed water upon the ramp (Tr. pp. 21, 22, 23) and appellees cannot now urge that the judgment is supported by facts which are not in the record and which were not found by the trial Court. The unquestioned rule applicable is that where facts are specially found by the trial Court, the reviewing Court is confined to the facts so found.

5 *Corpus Juris Secundum* 63;
Cole v. Manning, 79 Cal. App. 55, 248 Pac. 1065;
Massaro v. Savoy Estates Realty Co., 148 Atl. 342, 110 Conn. 452;
Norbeck & Nicholson Co. v. Nielsen, 164 N. W. 1033, 39 S. D. 410;

Roberg v. Town of Troy, 163 Atl. 770, 105 Vt. 134;

Elliott v. Kern, 161 N. E. 662, 90 Ind. App. 453.

There is not one word or sentence in the record that would point to appellant or its servants as placing water upon the ramp. In fact, the undisputed evidence shows that the only treatment administered to the area in front of the store was the sweeping of the sidewalk several times during the day. (Tr. p. 131.)

The appellees admit that their contention that appellant's servants placed water upon the ramp is at most an "inference" drawn by the trial Court. (Appellees' Br. p. 14.) A reading of the record will disclose that Hon. Judge Healy did not make such an inference as that contended for by appellees and it follows therefore that appellees' arguments and authorities must fail as having been founded upon an assumed fact which is not supported either by the testimony in the record or the findings of the trial Court.

The Court could only speculate from the evidence before it, as to the origin of the water, if any, upon the ramp and the length of time it had remained upon the ramp prior to the accident. It is just as reasonable to deduce from the record that the water came from snow which dropped from the awning box (Tr. p. 131) as from any other source. And the Court could as well infer that the water, if any, had been present upon the ramp for only a few seconds before the

accident, as that it had remained there for a sufficient period of time to give defendant notice thereof.

There is not an iota of evidence upon these essential facts, which appellees were required to prove by a preponderance of the evidence. The judgment of the trial court rests only upon speculation and conjecture, is unsupported by any evidence and cannot be permitted to stand.

Missouri Pac. R. Co. v. Remel, 48 S. W.

(2d) 548, 185 Ark. 598, Cert. Den. 53 S. Ct.

85, 287 U. S. 634, 77 L. Ed. 550;

Randleman v. Boeres, 270 Pac. 374, 73 Cal.

App. 745;

Clarke v. Blackfoot Water Works, 228 Pac.

326, 39 Ida. 304;

Studebaker Bros. Co. of Utah v. Horbert, 207

Pac. 587, 35 Ida. 490;

Harker v. Seawell, 206 Pac. 812, 35 Ida. 457;

Spencer v. John, 197 Pac. 827, 33 Ida. 717.

The cases cited by appellees (Appellees' Br. p. 15) in support of their argument are not applicable herein for the reason that in all except *Marano v. Jensen*, 49 N. Y. S. 346 (Appellees' Br. p. 15), the obstacles, conditions or instrumentalities causing the injury were proved to have been placed in position by the defendants.

In *Marano v. Jensen*, supra, a memorandum decision without opinion, the snow causing the injury had remained for at least two hours upon the defendants' doorstep. Mrs. Lamberson's own testimony that the

water was not on the ramp when she went into the store distinguishes this case also.

The trial Court found only that “defendant was negligent in allowing said water to be upon and remain upon said ramp or entrance way”. (Tr. p. 23.) It did not find that defendant had placed any water thereon, and therefore appellees’ arguments and authorities to the effect that the *findings* will not be disturbed on appeal unless unsupported by sufficient evidence, are not applicable herein. Appellant’s position is that the trial Court’s finding of negligence is without support in the record because there is no evidence of actual knowledge of the presence of the water upon the ramp, and no proof that it remained there for a sufficient length of time to give appellant constructive notice.

Appellees have countered with their own finding, not the Court’s, that appellant placed the water upon the ramp. It is submitted that appellant’s argument has not been answered, because it cannot be answered. The reason is obvious: There is nothing in the record to provide an answer.

“The burden of proving defendant’s negligence is upon the plaintiff. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant.

* * * * *

“Until it is established that the accident was occasioned through the negligence of defendant’s employees, or as the result of the existence of a condition of which defendant had either actual or constructive notice, there can be no recovery.”

F. W. Woolworth v. Williams (Ct. App. D. C., 1930), 41 F. (2d) 970 at p. 971.

In reversing a judgment for plaintiff the Court further said at page 972:

“No attempt is made to show how or by whom the oil spot was created, nor as to how long it existed; so far as appears, it may have come into existence between the time that plaintiff entered the store and when she started to leave, and may have been caused by some person having no connection whatsoever with defendant.

* * * * *

Applying the foregoing well established rules, as to the liability of a storekeeper for the safety of his customers to the case at bar, there is no theory upon which the judgment can be sustained. To uphold this judgment would be equivalent to making the defendant an insurer for the safety of its customers while in its store, and this is not the law.”

III.

Appellees have argued that contributory negligence is a question of fact in this case and not a question of law. Appellees have not, however, disputed the fact that the presence of water upon the ramp was an

open, obvious and visible condition which would be apparent to anyone who looked at it. Mrs. Lamber-son either did not look where she was going or if she did look she failed to see the water. In either case, she would be guilty of contributory negligence as a matter of law.

“To say one looked and did not see when there are no obstructions and the view is clear, is so incredible that courts will charge contributory negligence in such a case as a matter of law.”

New York Telephone Co. v. Becker, 30 F. (2d) 578.

“The law requires a person to make reasonable use of his faculties to observe and avoid danger, and conclusively presumes that he knows what he would have known, had he made ordinary use of his senses.”

De Honey v. Harding, 300 F. 696;

Johnson v. Washington Route Inc., 121 Wash. 608, 209 Pac. 1100.

In the cases cited by appellees: *Donovan v. Boise City*, 171 Pac. 670, 31 Ida. 324; *Osier v. The Consumer's Company*, 41 Ida. 268, 239 Pac. 735; *Williamson v. Neitzel*, 45 Ida. 39, 260 Pac. 735; *Giffen v. City of Lewiston*, 6 Ida. 231, 55 Pac. 545; *McKenna v. Gronbaum*, 23 Ida. 46, 190 Pac. 919; *Flach v. Fikes*, 267 Pac. 1079, 204 Cal. 329; and *Davis v. Pacific Power Co.*, 40 Pac. 950, 107 Cal. 563, the lighting conditions were so poor due to inadequate illumination or the time of the day that the plaintiffs involved were not conclusively presumed to have seen the dan-

gers, and therefore contributory negligence was regarded as a question of fact. These cases have no application to the instant case where the sun was shining, the scene was out of doors, and lighting conditions were satisfactory.

The next three cases cited by appellees: *Bennett v. Deaton*, 68 Pac. (2d) 895, 57 Ida. 752; *Adkins v. Zalasky*, 81 Pac. (2d) 643, and *Baldwin v. Mittry*, 102 Pac. (2d) 643, 61 Ida. 427, concern only accidents involving motor vehicles, and for that reason are not conclusive upon the duties of storekeepers and invitees.

IV.

Appellees' last argument, like their second one is based upon a fact not in evidence. On page 3 of appellees' brief, the statement is made that Dr. Cline testified to the *permanent* loss of flexibility and mobility. It is submitted that nowhere in the record is there any mention of *permanent* disability. After having interpreted Dr. Cline's testimony on the percentage of disability to mean the percentage of *permanent* disability, appellees have quoted from the testimony at page 122 of the transcript. The very testimony quoted, however, disproves rather than proves their erroneous interpretation for it shows that Mrs. Lamberson had experienced improvement in the use of her arm, that her condition was not static and that the percentage of disability of the wrist and fingers fixed at 75% was not intended to and in fact did not

describe the percentage of permanent disability: For all that appears, Mrs. Lamberson's condition would continue to improve in the future.

“Q. And further, Doctor, will you look at her arm and wrist?

A. You mean examine her arm now?

Q. Yes.

A. I would say that this is a little difficult to remember, but I would say that the deformity is the same as it was; that the swelling is less; that she has more motion in the fingers than she had at the last examination; that the evidence of arthritic changes are about the same.”

(Tr. p. 122.)

It is submitted that neither Dr. Cline nor Mrs. Lamberson testified as to the nature and extent of any *permanent* disability and that Mrs. Lamberson's own testimony with respect to her deformity, her pain and her disability, in so far as it may be designed to prove the percentage of permanent disability invades the field of expert testimony.

It has been heretofore pointed out that the appellees' own statement is incompetent to establish the fact of permanent injury.

The Grecian Monarch (D. C. D. N. J., 1887), 32 F. 635;

Forrest E. Gilmore Co. v. Hurry, 165 Okla. 29, 24 Pac. (2d) 653.

Appellees have contended that appellant cannot now raise the question of the Court's failure to segregate the damages allowed. However, the rule is

clear that wherever an error is apparent on the record, it is open to revision, whether it be made to appear by a bill of exception or in any other manner.

Suydam v. Williamson, 61 U. S. 427, 20 How. 427, 15 L. Ed. 978.

It is respectfully submitted that the judgment of the honorable trial Court cannot stand for the foregoing several reasons, and that the judgment must be reversed.

Dated, Oakland, California,
July 14, 1943.

OTTO E. McCUTCHEON,
Idaho Falls, Idaho,
W. B. POWELL,
2825 East 14th Street, Oakland, California,
W. L. SCHOENER,
2825 East 14th Street, Oakland, California,
Attorneys for Appellant.

No. 10386

United States

Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC POWER & LIGHT COMPANY, and
AMERICAN POWER & LIGHT COMPANY,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

Transcript of the Record

In Three Volumes

VOLUME I

Pages 1 to 272

UPON PETITION FOR REVIEW OF ORDER OF THE
FEDERAL POWER COMMISSION

FILED

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United States of America
Federal Power Commission

Commissioners Leland Olds, Chairman, Claude L.
Draper, Basil Manly, John W. Scott and Clyde
L. Seavey.

July 1, 1941

Docket No. IT-5611

In the Matter of

PACIFIC POWER & LIGHT COMPANY

ORDER RESUMING HEARING AND
TO SHOW FURTHER CAUSE

It appearing to the Commission that:

(a) On April 16, 1940, the Commission, having under consideration the failure of Pacific Power & Light Company of Portland, Oregon, to comply with Electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts prescribed for Public Utilities and Licensees, and with the Commission's order adopted May 11, 1937, ordered the Company to show cause, if any there be, at a public hearing:

(1) Why it had failed to comply with electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts and with the order of the Commission adopted May 11, 1937;

(2) Why the petition of the Company dated December 20, 1939, for an extension of time to July 1, 1940, should not be denied; and

(3) Why the Commission should not institute appropriate proceedings against the Company, its officers or directors for failure to comply with the provisions of Electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts and the Commission's order dated May 11, 1937;

(b) Pursuant to the order of April 16, 1940, a public hearing was begun on May 20, 1940, before an Examiner of the Commission at Washington, D. C., and the hearing was recessed from day to day until May 24, 1940, upon which day the hearing was adjourned by the Commission's Examiner, subject to further orders of the Commission;

(c) The Company, since the adjournment of the hearing referred to in paragraph (b) hereof, filed, on July 3, 1940, its proposed reclassification and original cost studies required by Electric Plant Instruction 2-D of the Commission's Uniform System of Accounts, and the Commission's order of May 11, 1937;

(d) The Commission's staff and the staff of the Public Utilities Commissioner of Oregon have made a field study of the Company's proposed reclassification and original cost studies and have submitted a joint report to this Commission entitled, "Pacific Power & Light Company, Portland, Oregon, Report on the Reclassification and Original Cost Studies of Electric Plant as at January 1, 1937", which

report is to be served herewith upon the Company;

(e) The Company has not fully complied with the requirements of Electric Plant Instruction 2-D of the Commission's Uniform System of Accounts and the Commission's order of May 11, 1937;

(f) The Company has not properly determined the amounts includible in Account 100.5, Electric Plant Acquisition Adjustments;

(g) The joint report, described in paragraph (d) above, proposes certain adjustments of the Company's accounts, the disposition of certain amounts classified in Account 107, Electric Plant Adjustments, and recommends that the Company make a proper reclassification of the amount transferred to Account 100.6, Electric Plant in Process of Reclassification; all as more fully set forth in said joint report;

The Commission finds that;

(1) It is advisable, necessary and proper in the public interest to resume and to enlarge the scope of the hearing which pursuant to the Commission's order of April 16, 1940, was begun on May 20, 1940, and was by the Commission's Examiner, adjourned on May 24, 1940, subject to the further orders of the Commission;

Therefore the Commission orders that:

(A) The Secretary serve a copy of the report referred to in paragraph (d) hereof upon

the Company concurrently with the service of this order upon the Company;

(B) The hearing referred to in paragraphs (b) and (1) hereof be resumed on August 25, 1941, at 9:45 a.m., Pacific Standard Time, in Circuit Court Room 704, New Courthouse Building, at Portland, Oregon:

(C) At said hearing Pacific Power & Light Company show further cause, if any there be;

(i) Why it has failed to comply fully with Electric Plant Accounts, Instruction 2-D of the Commission's Uniform System of Accounts and with the order of the Commission adopted May 11, 1937;

(ii) Why the Company should not make the adjusting entries on its books to conform with the recommendations made by the staffs of this Commission and the Public Utilities Commissioner of Oregon in the joint report referred to in paragraph (d) above;

(iii) Why the Company should not submit a plan for the disposition of the amounts which may be properly established in Account 100.5, Electric Plant Acquisition Adjustments, in accordance with the evidence adduced at said hearing;

(iv) Why the Company should not submit plans for the disposition of the amount of \$9,-694,593.47, classified in Account 107, Electric Plant Adjustments;

(v) Why the Company should not prepare and submit to the Commission a proper reclassification of the amount of \$492,571.76 trans-

ferred in the joint report, referred to in paragraph (d) hereof, to Account 100.6, Electric Plant in Process of Reclassification;

(vi) Why the Company should not be required to make such other studies as are recommended in the joint report referred to in paragraph (d) hereof, and as fully set forth in the said joint report;

(vii) Why this Commission should not by order determine that disposition be made of the amounts properly established in Account 100.5, Electric Plant Acquisition Adjustments, and Account 107, Electric Plant Adjustments, in accordance with the evidence adduced at said hearing;

(viii) Why the Commission should not institute appropriate proceedings against the Company, its officers, or directors, for failure to comply with the provisions of Electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts and the Commission's order dated May 11, 1937;

(D) The Public Utilities Commissioner of the State of Oregon and the Washington Department of Public Service may participate in said hearing, as provided in Part 39, Section 39.4 of this Commission's Rules of Practice and Regulations prescribed pursuant to the provisions of the Federal Power Act.

By the Commission.

LEON M. FUQUAY,
Secretary.

[Title of Commission and Cause.]

PETITION TO INTERVENE

American Power & Light Company (hereinafter sometimes called "American") hereby respectfully represents that:

I. American is a corporation organized under the laws of the State of Maine. It is a public utility holding company, registered, as such, under the Public Utility Holding Company Act of 1935, and owns varying percentages of the outstanding securities of certain electric utility companies and other companies.

II. American owns 1,000,000 shares of the Common Stock of Pacific Power & Light Company, being all of such Common Stock presently outstanding, as well as a 6% promissory note of said Pacific Power & Light Company in the presently outstanding principal amount of \$2,794,500.

III. American is informed and believes (a) that the present fair value of the property of Pacific Power & Light Company fully supports that Company's existing balance sheet and security structure and (b) that said Company's Common Stock was validly issued and for valuable consideration.

IV. American is informed and believes that the Common Stock of Pacific Power & Light Company is now validly outstanding in the hands of American.

V. This proceeding was initiated by an order of the Federal Power Commission dated July 1,

1941, which is rested upon a report of the Commission's staff after examination of the Company's reclassification and original cost studies entitled "Pacific Power & Light Company, Portland, Oregon, Report on the Reclassification and Original Cost Studies of Electric Plant as at January 1, 1937", and directs Pacific Power & Light Company to show cause:

"(ii) Why the Company should not make the adjusting entries on its books to conform with the recommendations made by the staffs of this Commission and the public Utilities Commissioner of Oregon in the joint report referred to in paragraph (d) above;

(iii) Why the Company should not submit a plan for the disposition of the amounts which may be properly established in Account 100.5, Electric Plant Acquisition Adjustments, in accordance with the evidence adduced at said hearing;

(iv) Why the Company should not submit plans for the disposition of the amount of \$9,694,593.47, classified in Account 107, Electric Plant Adjustments;

(vii) Why this Commission should not by order determine that disposition be made of the amounts properly established in Account 100.5, Electric Plant Acquisition Adjustments, and Account 107, Electric Plant Adjustments, in accordance with the evidence adduced at said hearing."

VI. American is informed and believes that the staff of the Commission will contend at such hearing that the Commission should enter an or-

der requiring the Pacific Power & Light Company to make immediate disposition of amounts aggregating many millions of dollars which the staff of the Commission contends should be established in Accounts 100.5 and 107, by direct charge to surplus or by some plan having a substantially similar effect.

VII. American is informed and believes that any such ordered disposition will substantially impair or even destroy the value of the securities of Pacific Power & Light Company so held by American.

VIII. American is informed and believes that the Commission is without authority under the Federal Power Act or acting in accordance with the Commission's system of accounts (a) to order the reclassification of said amount of \$9,694,593.47 in Account 107 or the disposition thereof, or (b) to order the reclassification of the amounts which the Commission's staff will contend should be established in Account 100.5 or the disposition thereof, and that if the Pacific Power & Light Company is required to make disposition of such amounts it will deprive American and the holders of its securities of property without due process of law and will take the property of American and its security holders for a public use without just compensation, in violation of Article V of the Amendments to the Constitution of the United States.

IX. American represents that a justiciable controversy exists with respect to the above described matters, that it is a proper party in interest to any proceeding in which said matter of disposition may

be in issue and that its participation in this proceeding is proper and in the public interest.

Wherefore, American Respectfully Prays:

(1) That leave be granted to it to intervene in the above entitled proceeding and to become a party thereto for the purpose of asserting and defending the property rights of American and of its security holders in and to the Common Stock of Pacific Power & Light Company; and

(2) That it may be heard in said proceeding and permitted to introduce oral or written testimony with respect to all matters affecting its interests herein and particularly with respect to the matters hereinbefore set forth.

AMERICAN POWER & LIGHT
COMPANY

By H. L. ALLER
President.

REID & PRIEST

Two Rector Street
New York, N. Y.
Attorneys for Petitioner.

(Duly Verified.)

Federal Power Commission docketed Aug. 28, 1941.

Federal Power Commission Aug. 28, 1941 received.

[Title of Commission and Cause.]

Commissioner Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

September 16, 1941.

ORDER PERMITTING AMERICAN POWER & LIGHT COMPANY TO INTERVENE

It appearing to the Commission that:

(a) On August 28, 1941, American Power & Light Company filed a petition to intervene herein:

(b) American Power & Light Company is a registered holding company and owns all the presently outstanding Common Stock of Pacific Power & Light Company, as well as a 6% promissory note of said Pacific Power & Light Company in the presently outstanding principal amount of \$2,-794,500;

(c) The participation of American Power & Light Company in the above entitled proceedings may be in the public interest;

The Commission orders that:

American Power & Light Company be and it is hereby permitted to become an intervener and party to these proceedings, subject to the rules and regulations of the Commission; provided, however, that the admission of American Power & Light Company as an intervener and party to the proceedings herein shall not be construed as acknowledgment by the Commission that the character of evidence described in the petition to intervene is considered relevant and material to the issue at hear-

ing, nor as recognition by the Commission that such party might be aggrieved by any order of the Commission issued in these proceedings.

By the Commission.

LEON M. FUQUAY,
Secretary.

[Title of Commission and Cause.]

PETITION TO INTERVENE

Now comes your petitioner, Public Utilities Commissioner of Oregon, hereinafter called the "Intervener", and respectfully represents that it has an interest in the subject matter in the above-entitled proceedings relating to Pacific Light & Power Company, hereinafter called "Company", and desires to intervene and become a party to said proceeding, as provided by Section 1.31, Rules of Practice and Regulations, Federal Power Commission, and says:

1. That intervener is a state commission of the State of Oregon, as provided by the laws of said State of Oregon; that the above-mentioned Pacific Light & Power Company is a public utility company operating in the said State of Oregon and subject to the jurisdiction and regulation of this Intervener, as provided by the laws of the said State of Oregon;

2. That said company mailed to this Intervener on the 2d day of July, 1940, its report entitled "Reclassification of Plant Accounts as of January 1,

1937'' made pursuant to the Uniform System of Accounts and Order No. 5962 adopted by this Intervener;

3. That thereafter a joint report was made on the 21st day of June, 1941, by the Federal Power Commission and this Intervener entitled "Report on the Reclassification and Original Cost Studies of Electric Plant as at January 1, 1937";

4. That the position and interest of this Intervener is the same as that of the Federal Power Commission specified in the Order to show cause, dated July 1, 1941, in the above-entitled matter and Docket No. IT-5611;

Therefore this Intervener prays: That the Pacific Light & Power Company show cause why the Federal Power Commission should not order the adjustment of the said company's accounts to conform with the aforementioned joint "Report on the Reclassification and Original Cost Studies of Electric Plant as at January 1, 1937", made on the 21st day of June, 1941, and that the Public Utilities Commissioner of Oregon be made a party by intervention in this proceeding.

ALVIN A. KURTZ

General Counsel for Petitioner

460 N. Commercial St.
Salem, Oregon

(Duly Verified)

Federal Power Commission, Jul. 21, 1941, received.

[Title of Commission and Cause.]

PETITION FOR INTERVENTION

Comes now the Department of Public Service of Washington, and petitions the Federal Power Commission for permission to intervene in the above entitled proceedings, as provided by Section 1.31, Part 1, of the Rules of Practice and Regulation, for the following reasons:

That Petitioner is the regulatory agency of the State of Washington, as provided by the laws of the said State of Washington.

That the Pacific Power & Light Company is a public service company, operating in the State of Washington, within the meaning of the public service laws of this State and is subject to the regulations of this Petitioner, as provided by the laws of the said State of Washington.

That the said Petitioner is affected by and has an interest in the above entitled proceedings relating to the Pacific Power & Light Company.

Wherefore said Department of Public Service of Washington, Petitioner, prays

Leave to intervene and participate in all proceedings herein and that it receive notice of all such future proceedings.

(Signed) SMITH TROY

Attorney General

(Signed) HARRY A. BOWEN

Special Assistant Attorney
General

Attorneys for Department of
Public Service of Washing-
ton

(Duly Verified)

(Affidavit of Service by Mail Sept. 19, 1941.)

Federal Power Commission, Sep. 23, 1941, received.

[Title of Commission and Cause.]

Commissioners Leland Olds, Chairman, Basil Manly and John W. Scott. Claude L. Draper and Claude L. Seavey not participating.

August 9, 1941.

**ORDER PERMITTING PUBLIC UTILITIES
COMMISSIONER OF OREGON TO IN-
TERVENE**

It appearing to the Commission that:

(a) On July 21, 1941, the Public Utilities Commissioner of Oregon filed a petition for permission to intervene in and become a party to the above-entitled proceeding:

(b) The participation of the Public Utilities

Commissioner of Oregon in this proceeding may be in the public interest;

The Commission orders that:

The Public Utilities Commissioner of Oregon be and is hereby permitted to become an intervener and party to the above-entitled proceeding subject to the rules and regulations of this Commission.

By the Commission.

J. H. GUTRIDE,
Acting Secretary

[Title of Commission and Cause.]

Commissioners Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

September 26, 1941

ORDER PERMITTING DEPARTMENT OF
PUBLIC SERVICE OF WASHINGTON TO
INTERVENE

It appearing to the Commission that:

(a) On September 23, 1941, the Department of Public Service of Washington filed a petition for permission to intervene in and become a party to the above-entitled proceeding:

(b) The participation of the Department of Public Service of Washington in this proceeding may be in the public interest;

The Commission orders that:

The Department of Public Service of Washing-

ton be and is hereby permitted to become an intervenor and party to the above-entitled proceeding, subject to the rules and regulations of this Commission.

By the Commission.

LEON M. FUQUAY

Secretary

MOTION TO DISMISS

Pacific Power & Light Company, hereinafter referred to as "the Company", hereby moves to dismiss this proceeding instituted by the order of the Federal Power Commission dated April 16, 1940, as extended by further order, entitled "Order Resuming Hearing and to Show Further Cause", dated July 1, 1941. For convenience the Federal Power Commission is sometimes hereinafter referred to as the "Commission"; said order of July 1, 1941, is referred to as "the order"; and the Federal Power Act is referred to as the "Act". This motion to dismiss is based upon the following grounds:

First: The Company was organized under and in accordance with the laws of the State of Maine on June 16, 1910. It is now, and since the date of its organization has been, engaged primarily in the business of constructing, maintaining, and operating facilities for the generation, transmission, and

distribution of electric energy in the States of Oregon and Washington.

Its system includes facilities in the states of Oregon and Washington used for the generation of electric energy, certain interstate transmission lines, certain facilities used only for the transmission of electric energy in intrastate commerce, and extensive facilities used exclusively in local distribution. Such intrastate facilities comprise the major part of the Company's property. Its activities and operations are now, and were since prior to enactment of the Federal Power Act, subject to comprehensive state regulation by the states of Oregon and Washington with respect to its basic corporate books of account, rates, adequacy of service, issuance of securities, accounting, and other aspects of its business which concern the general public interest. Its business is essentially local in character. Its revenues are derived under rates fixed by state regulatory authorities in accordance with the laws of their respective jurisdictions, which recognize the utility's right to a fair return upon the fair value of its property devoted to public use. The Company is also subject to the general laws of the State of Maine, relating to the conduct of its corporate affairs, the status of its capital stock, and the rights and obligations of its stockholders.

The Commission, both by its said orders of April 16, 1940, and July 1, 1941, and by its so-called Uniform System of Accounts prescribed for Public Utilities and Licensees, effective January 1, 1937, and its order of May 11, 1937, pertaining to said

System of Accounts, attempts to assume comprehensive accounting jurisdiction, not only over the project property of licensees and over the facilities subject to the jurisdiction of this Commission which are owned and operated by public utilities, but also over properties and operations of public utilities which are, by express provision of the Federal Power Act, excepted and removed from the jurisdiction of the Commission. Such attempt of the Commission to extend its regulatory jurisdiction to matters subject to regulation by the states violates the Federal Power Act. The Commission has no accounting jurisdiction over the Company's general corporate and other fundamental accounts and records, such matters being subject to state regulation.

Second: The Commission's Uniform System of Accounts violates both the letter and spirit of the Act and exceeds the lawful authority of the Commission under the Act and under the Constitution of the United States in that:

(a) thereby the Commission attempts to assume accounting jurisdiction over properties and operations not subject to the jurisdiction of the Commission, as more fully set forth in paragraph First hereof;

(b) the Commission is not authorized by law to require the general corporate or other fundamental accounts and records of the Company to be kept on the basis of original cost, as the term is defined and interpreted by the Commission, or to employ such basis as the measure of amounts to be entered or retained in the accounts of the Company, or to

determine the value of property of the Company for purposes of controlling such accounts;

(c) the Uniform System of Accounts, as interpreted by the Commission and its staff, and the requirements of its said various orders with respect to reclassification and disposition, are unreasonable and unlawful, in that they freeze and make definite certain past accounting acts and practices where by so doing the interests or claims of the utility may be prejudiced, while overriding such acts and practices where by so doing such interests or claims of the utility may also be prejudiced; and in that said System and said requirements are based on an arbitrary and retrospective application of the System of Accounts to transactions and accounting practices which took place or were made prior to the enactment of the Act or to the adoption of the System of Accounts, to the unlawful prejudice and deprivation of property rights vested prior to enactment of the Act.

(d) the System of Accounts as interpreted by the Commission arbitrarily excludes from electric plant account elements of actual original cost which were not previously recorded therein by the Company, while corresponding elements so recorded by other similar utilities are permitted to remain therein; and, by such discrimination, said System makes impossible the application of uniform standards of accounting among the various utilities which the Commission is attempting to subject to the requirements of said System.

(e) the Commission, in and by this proceeding,

attempts to exercise judicial powers and to adjudicate matters which are determinable and subject to adjudication only in a direct proceeding in a court of competent jurisdiction.

Third: The Commission's said order of July 1, 1941, which here serves only the purpose of a notice of hearing, and which directs the Company, among other things, to appear and show cause *by* it failed to comply with Electric Plant Accounts, Instruction 2-D, and said order of May 11, 1937, and why it should not be required to adjust its books of account to conform with the Joint Report of the staffs of the Commission and the Public Utilities Commissioner of Oregon, which Joint Report has not been adopted by the Commission as a finding, is indefinite and uncertain, and said order fails to apprise the Company with reasonable definiteness of the issues of said hearing or the claims or proposals to which the Company is called upon to respond at such hearing, so as to enable it adequately to prepare for such hearing; nor has the Company been apprised with reasonable definiteness or certainty as to the issues which may be presented as to the disposition of amounts ultimately to be established in Accounts 100.5 or 107 "in accordance with the evidence adduced at said hearing", inasmuch as the amounts which properly may be so established have not been determined by the Commission, and since it is impossible to anticipate what evidence may be adduced in respect thereof at said hearing.

Fourth: The Commission is without jurisdiction in this proceeding to order the Company to write

off or otherwise dispose of any amount now recorded in its fundamental books of account, and particularly any amount the writing off of which would impair the security structure of the Company, for the following reasons, among others:

(a) No jurisdiction has been conferred upon the Commission under the Act to require the writing off of property values from the accounts of the Company;

(b) The Company maintains, as set forth in its Statement A on file with the Commission herein, and for aught that appears in the record in this accounting proceeding, it must be assumed for the purposes of this motion, and until the question has been properly determined in an appropriate proceeding, that the fair present value of the property in the Company's electric plant account, as determinable under the laws of the states of Oregon and Washington, and under the laws of the United States, is not less than the amount entered on the books of the Company as the cost of such electric plant, and that such value fully supports the Company's security structure;

(c) Any such disposition would, therefore, unlawfully prejudice the Company and its security holders by its failure to recognize the fair value of such property as determined and protected under the decisions of the Supreme Court of the United States and of the courts of the states of Oregon and Washington;

(d) The Commission is without jurisdiction in any event to order any such disposition prior to a final determination of the amounts properly to be

classified in the books of the Company as the cost of its electric plant and other assets; and the issuance of an order of disposition, as a result of this hearing, would deprive the Company of fair notice and hearing, and of due process of law.

Fifth: The Commission is without jurisdiction to proceed further under said orders, and the proceedings thereunder should be dismissed, because the regulation of intrastate business and operations sought to be enforced under and by virtue of said System of Accounts is not within any power vested in Congress by the Constitution of the United States, but is an invasion of the powers reserved to the states and to the people within the meaning of Article X of the Amendments to said Constitution; because such regulation would deprive the Company of property and property rights without due process of law, and would take such property and property rights for public use without just compensation, in violation of Article V of the Amendments to said Constitution; because the indefiniteness and uncertainty of the notice of hearing herein violate the due process clause of Article V of the Amendments to said Constitution; and because the Commission is undertaking to exercise judicial powers vested only in the Courts in violation of Article III of said Constitution.

In submitting this motion, the Respondent Expressly reserves and refuses to waive any constitutional or legal rights, and expressly reserves the right to contest the validity and the constitutionality of any provision of the Federal Power Act as applied to it, and of any rule, regulation of order

now or hereafter made by the Commission with respect to the Company's Electric Plant Account in purported reliance upon said Act.

Portland, Oregon, September 27, 1941.

Respectfully submitted,

LAING GRAY & SMITH

By JOHN A. LAING

Public Service Building

Portland, Oregon

Attorneys for Pacific Power
& Light Company

Federal Power Commission, Sept. 29, 1941, received.

[Title of Commission and Cause.]

ANSWER

Pacific Power & Light Company, hereinafter referred to as "the Company", without waiver of and expressly subject to the objections and grounds recited in its Motion to Dismiss this proceeding, dated September 27, 1941, and expressly reserving all of its legal rights in respect of such objections and such grounds for dismissal of this proceeding, hereby makes and files its Answer to the order of the Federal Power Commission dated April 16, 1940, as extended by further order of the Commission herein, entitled "Order Resuming Hearing and to Show Further Cause", dated July 1, 1941. For convenience, the Federal Power Commission is referred to herein as "the Commission"; and the Federal Power Act is referred to as "the Act".

As and for its Answer to said orders, the Company alleges and shows as follows:

I.

Order of April 16, 1940

The matters in respect to which the Company was required by said order of April 16, 1940, "to show cause", were the following:

"(1) Why it has failed to comply with Electric Plant Accounts Instruction 2D of the Commission's Uniform System of Accounts and with the order of the Commission adopted May 11, 1937;

(2) Why the petition of the Company dated December 20, 1939, for an extension of time to July 1, 1940, should not be denied; and

(3) Why the Commission should not institute appropriate proceedings against the Company, its officers or directors for failure to comply with the provisions of Electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts and the Commission's order dated May 11, 1937;"

and as to said matters and each of them, the Company has heretofore made full and complete answer as of May 23, 1940, by its written and verified answer thereto filed herein on May 18, 1940, and by the testimony of Will T. Neill, vice president of the Company, presented at the hearing held on said show cause order at Washington, D. C., on May 23, 1940; and the answer and showing so made are hereby adopted and confirmed, and are hereby as-

serted to be a full and complete answer to said order of April 16, 1940, as of said date of the hearing held thereon.

II.

Order of July 1, 1941

The matters in respect of which the Company was required by said order of July 1, 1941, "to show cause" are set forth as subparagraphs (i) to (viii) inclusive of paragraph (C) of said order, as follows:

"(i) Why it has failed to comply fully with Electric Plant Accounts, Instruction 2-D of the Commission's Uniform System of Accounts and with the order of the Commission adopted May 11, 1937;

(ii) Why the Company should not make the adjusting entries on its books to conform with the recommendations made by the staffs of this Commission and the Public Utilities Commissioner of Oregon in the joint report referred to in paragraph (d) above.

(iii) Why the Company should not submit a plan for the disposition of the amounts which may be properly established in Account 100.5, Electric Plant Acquisition Adjustments, in accordance with the evidence adduced at said hearing;

(iv) Why the Company should not submit plans for the disposition of the amount of \$9,694,593.47, classified in Account 107, Electric Plant Adjustments;

(v) Why the Company should not prepare and submit to the Commission a proper reclassification

of the amount of \$492,571.76 transferred in the joint report, referred to in paragraph (d) hereof, to Account 100.6, Electric Plant in Process of Reclassification;

(vi) Why the Company should not be required to make such other studies as are recommended in the joint report referred to in paragraph (d) hereof, and as fully set forth in the said joint report;

(vii) Why this Commission should not by order determine that disposition be made of the amounts properly established in Account 100.5 Electric Plant Acquisition Adjustments and Account 107, Electric Plant Adjustments, in accordance with the evidence adduced at said hearing;

(viii) Why the Commission should not institute appropriate proceedings against the Company, its officers, or directors; for failure to comply with the provisions of Electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts and the Commission's order dated May 11, 1937;''

III.

Order of July 1, 1941—Subparagraph (i)

With respect to the matters set forth in said subparagraph (i) as of the date of the hearing held herein on May 23, 1940,

(a) The Company hereby refers to, and by such reference incorporates herein, the Company's said answer of May 18, 1940, and the testimony of Will T. Neill, vice president of the Company, presented at said hearing of May 23, 1940.

(b) With respect to the status of such matters as of September 29, 1941, the date of this Answer, the

Company airmailed on July 1, 1940, and filed with the Commission on July 3, 1940, a volume consisting of 152 printed pages with a cover page entitled in part: "Pacific Power & Light Company—Reclassification of Electric Plant—Statements A to I inclusive"; and since said date the Company has completed, and on September 27, 1941, the Company transmitted by airmail to the Commission at Washington, D. C., and on September 26, 1941, delivered to the representatives of the Commission's staff at Portland, Oregon, original and several copies of a volume compiling the results of further studies, analyses, and revisions made by the Company since July 3, 1940, pertaining to the matters covered by the original Statements B, E, F, G, H, and I filed with the Commission on that date, said compilation consisting of Revised Statements B, E, F, G, H, and I, respectively, with an Introductory and Explanatory Statement in the form of a letter to the Commission dated September 26, 1941, attached to said Revised Statements, all verified by oath of said Will T. Neill under date of September 26, 1941.

(c) The preparation and filing of said original Statements filed July 3, 1940, and of said Revised Statements and Introductory and Explanatory Statements so airmailed to the Commission on September 27, 1941, and delivered to the Commission's staff on September 26, 1941, constitute full compliance by the Company with the provisions of the aforementioned Instruction 2-D, and of said order of the Commission adopted May 11, 1937.

IV.

Order of July 1, 1941—Subparagraph (ii)

With respect to the matters set forth in said subparagraph (ii),

(a) The Company refers to, and by such reference incorporates herein, the statements and data contained in the aforementioned Introductory and Explanatory Statement dated September 26, 1941, and the accompanying revised Statements B, E, F, G, H, and I.

(b) The Company's treatment of the adjustments proposed in said Joint Report is summarized and explained on pages 5 to 15, inclusive, of said Introductory and Explanatory Statement of September 26, 1941; and, as stated on page 12 of said Introductory and Explanatory Statement—

“It will be noted * * * by comparing the Company's treatment of the examiners' proposed adjustments with the recommendations pertaining thereto contained in the Joint Report, that the Company and the staffs are in accord as to the “Original Cost” (as defined by the Commission to exclude any restatement of unrecorded costs) of the various items of property to be recorded in Account 100.1, Electric Plant in Service, and Account 100.2, Electric Plant Leased to Others; and that such differences as now exist between the Company's Revised Statements and the recommendations of the Joint Report relate exclusively to the particular Adjustment and other Accounts in which it is believed the differences between cost

to utility and such original cost should be recorded.”

(c) The Company believes and asserts that the cost to it of its electric plant, as determined in accordance with the laws of the States of Oregon and Washington, is not less than the amount that will be recorded in the accounts of the Company therefor in accordance with its said Revised Statements B, E, F, G, H, and I; and that, in the preparation of the original Statements and of said Revised Statements filed pursuant to the Commission's order of May 11, 1937, it has properly made such examinations, determinations and reclassifications as are reasonably required to determine the costs of original construction and the costs to the Company of its electric plant in accordance with the laws to which the Company has been subject in the recordation of such costs in its accounts; and that the adjustments recommended in the Joint Report, to the extent that they differ from the treatment proposed to be accorded thereto in the Company's said Introductory and Explanatory Statement and said Revised Statements, are improper and based upon erroneous premises, assumptions, and/or conclusions, and are not such as the Company may lawfully be required to enter upon its books of account.

V.

Order of July 1, 1941—Subparagraphs (iii)
and (iv)

With respect to the matters set forth in said subparagraphs (iii) and (iv),

(a) The Company, in and by its said Revised Statement H, has submitted its plans and proposals for the disposition of the amount established by it in Account 100.5, Electric Plant Acquisition Adjustments, in and by its said Revised Statements, namely, the sum of \$7,019,528.20, subject to the explanations, objections, and protest, and to the reservation of rights, set forth in the Foreword to said Statement H.

(b) The Company, in and by its said Revised Statement H, has submitted its plans and proposals for the disposition of the amount established by it in Account 140, Unamortized Discount and Expense, in its said Revised Statements, namely, the amount of \$2,024,993.99.

(c) The Company, in and by its said Revised Statement H, has submitted its plans and proposals for the disposition of the amount established by it in Account 107, Electric Plant Adjustments, in its said Revised Statements, namely, the amount of \$42,554.68.

(d) The sum of the amounts referred to in (a), (b), and (c) above represents \$9,087,076.87 of the total of \$9,694,593.47 referred to in said subparagraph (iv), and constitutes the entire amount thereof proposed by the Company to be disposed of. As stated at page 4 of the Foreword to said Revised Statement H,

“there is no ‘amount of \$9,694,593.47, classified in Account 107, Electric Plant Adjustments’; such amount representing merely a combination of certain figures referred to in the Joint Report of the

examiners (Joint Report, page 31), the proposed reclassification of which has not been accepted, except in part, by the Company, and none of which has yet been passed upon by the Commission.”

The Company, therefore, for the reasons more fully stated in said Foreword to said Revised Statement H, has no plan and cannot reasonably be required to submit a plan, for the disposition of any part of such \$9,694,593.47 not classified by it in said Revised Statements in said Account 107, Electric Plant Adjustments.

VI.

Order of July 1, 1941—Subparagraph (v)

With respect to the matters set forth in said subparagraph (v), the items making up this total have been discussed, and an appropriate reclassification has been presented, under Items 10, 11, 12, and 16, on pages 7 and 8 of the aforementioned Introductory and Explanatory Statement.

VII.

Order of July 1, 1941—Subparagraph (vi)

With respect to the matters set forth in said subparagraph (vi), namely, the making of “such other studies as are recommended in the Joint Report”, the Company has made and submitted the results of such further studies suggested by said Joint Report, and all of such further studies, except that it has not yet completed the suggested “studies with respect to the determination and

reclassification of cost of land and land rights” as to which the Joint Report states in part

“Although adjustment has been made in this report to reflect overall costs of electric plant land owned in fee, no attempt has been made to assemble costs by parcels. * * * It is recommended that the company immediately institute such studies as will permit conformance to Instruction 9-E.”

The Company has been and is now engaged in these particular studies, which involve painstaking research and investigations going back over a period of many years among deed records and other possible sources of information relating to all of the lands and land rights now owned by the Company as the result of innumerable transactions of predecessor companies. The Company is carrying on this work diligently and in good faith, but to complete the work will require many months of further study and investigation of such records, the ultimate results of which will have no material bearing upon the reclassification.

VIII.

Order of July 1, 1941—Subparagraph (vii)

With respect to the matters set forth in said subparagraph (vii),

(a) The requirements of said subparagraph (vii) are so palpably indefinite and uncertain, as set forth in paragraph Third of the Company’s Motion to Dismiss herein, as to preclude the Company’s showing cause with respect to the disposition of any amounts, other than as hereinabove

set forth, that may be determined by the Commission to be properly established in either Account 100.5, Electric Plant Acquisition Adjustments, or in Account 107, Electric Plant Adjustments. It is impossible for the Company to anticipate, other than as hereinabove set forth, what amounts may ultimately be established in said Accounts 100.5 and 107 "in accordance with the evidence adduced at said hearing", as such amounts have not yet been determined by the Commission, and the Company cannot anticipate what evidence may be introduced in respect thereof at the hearing, or what proposals the Company may be called upon to respond to as the result of any action taken by the Commission following such hearing. Consequently, any order entered herein following such hearing, which requires disposition of any such amounts, other than as hereinabove set forth, would be null and void as denying the Company fair notice and hearing and would deprive it of its property and property rights, without due process of law, in violation of Article V of the Amendments to the Constitution of the United States.

(b) The Commission has no jurisdiction in any event to order the Company to write off or otherwise dispose of any amount now recorded in its fundamental books of account, and particularly any amounts the writing off of which would impair the security structure of the Company, or which represent property values, for the following reasons, among others:

(1) No jurisdiction has been conferred on the Commission under the Act to require the writing off of property values from the accounts of the Company.

(2) The present fair value of the property in the Company's electric plant account, as determinable under the laws of the states of Oregon and Washington, and under the laws of the United States, is not less than the amount entered on the books of the Company as the cost of such electric plant, and such value fully supports the Company's security structure.

(3) Any such order of disposition would unlawfully prejudice the Company and its security holders by its failure to recognize the fair value of the Company's property as determined and protected under the decisions of the Supreme Court of the United States and of the courts of the states of Oregon and Washington.

IX.

Order of July 1, 1941—Subparagraph (viii)

With respect to the matters referred to in said subparagraph (viii), the matters and things hereinabove set forth or referred to in this Answer establish and show that the Company has complied fully and in good faith, and to the best of its ability, with the provisions of Electric Plant Accounts Instruction 2-D of the Uniform System of Accounts, and of the Commission's order dated May 11, 1937, and constitute a full and complete showing that no reasonable or lawful basis exists

for instituting proceedings against the Company, its officers, or directors, for alleged failure to comply with such provisions.

Wherefore the Company, having fully answered said orders of the Commission of April 16, 1940, and July 1, 1941, respectively, prays that the Commission enter an order dismissing this proceeding, or failing the entry of such order, that the Commission take no further or other action herein except to make and enter an order approving the Company's proposed reclassification of its electric plant accounts in form and substance as proposed and set forth in the Company's Revised Statements B, E, F, G, H, and I referred to above.

PACIFIC POWER & LIGHT
COMPANY

By WILL T. NEILL

Vice President

LAING GRAY & SMITH

By JOHN A. LAING

Attorneys for Pacific Power
& Light Company

(Duly Verified.)

[Title of Commission and Cause.]

OPINION No. 84

APPEARANCES

For Pacific Power & Light Company:

Laing, Gray & Smith by

John A. Laing, Esquire

Francis F. Hill, Esquire

For American Power & Light Company:

Reid & Priest by

N. H. Powell, Esquire

White & Case by

Adrian Foley, Esquire

Richard H. Appert, Esquire

For the Commission:

George Slaff, Esquire

Reuben Goldberg, Esquire

For the Public Utilities Commissioner of Oregon:

Alvin A. Kurtz, Esquire

For the Washington Department of Public Service:

Harry C. Bowen, Esquire

T. A. Martin, Esquire

A. J. Greer, Esquire

OPINION

By the Commission:

This proceeding arises under the Federal Power Act and relates to the Uniform System of Accounts prescribed by the Federal Power Commission for public utilities and licensees and to the accounting

entries which Pacific Power & Light Company (hereinafter sometimes referred to as "Respondent" or "Pacific") is to make pursuant to this System of Accounts.

HISTORY OF THE PROCEEDINGS

On April 16, 1940, we adopted an order requiring Pacific to show cause why appropriate proceedings should not be instituted for failure to comply with Electric Plant Accounts Instruction 2-D¹ of our Uniform System of Accounts and our order of May 11, 1937, in respect thereto. Hearing was held in May 1940 and, after testimony, adjourned by the presiding Trial Examiner, subject to the further order of the Commission.

On July 3, 1940, Pacific submitted its reclassification and original cost studies required by the foregoing Electric Plant Accounts Instruction. A field examination of the studies was made jointly

(1) Electric Plant Accounts Instruction 2-D of the Uniform System of Accounts provides, p. 38:

"D. Not later than 2 years after the effective date of this system of accounts, each utility shall have completed the studies necessary for classifying its electric plant as of the effective date of this system of accounts in accordance with the accounts prescribed herein and it shall submit to the Commission the entries it proposes to make to carry out the provisions of this instruction. It shall submit also a comparative balance sheet showing the accounts and amounts appearing in its books as of the effective date of this system of accounts and the accounts and respective amounts as of the same date after the proposed entries shall have been made."

by the staffs of this Commission and the Public Utilities Commissioner of Oregon, who prepared a joint report entitled, "Pacific Power & Light Company, Portland, Oregon, Report on the Re-classification and Original Cost Studies of Electric Plant as of January 1, 1937."

On July 1, 1941, we adopted an order transmitting the joint report to respondent and requiring it, among other things, to show cause why it should not make the accounting adjustments proposed in the report and submit appropriate plans for the disposition of amounts established in Account 100.5, Electric Plant Acquisition Adjustments, and Account 107, Electric Plant Adjustments. Hearings were held in Portland, Oregon, from September 29, 1941, to October 8, 1941.

Permission to intervene in the proceedings was granted to the Public Utilities Commissioner of Oregon, the Department of Public Service of the State of Washington, and American Power & Light Company (hereinafter sometimes referred to as "American"), Pacific's parent. The Honorable Ormond R. Bean, Public Utilities Commissioner of Oregon, presided jointly with our Trial Examiner in the proceedings.

THE ISSUES

During the course of the staff examination of the books and records of Pacific, the company itself made further studies and analyses and immediately prior to the hearing submitted to the staffs of both Commissions certain revisions to its

reclassification and original cost studies. These revisions, which were received in evidence at the hearing, brought Pacific into complete accord with the staffs of this Commission and the Oregon Commissioner as to the original cost of electric plant includible in Account 100.1, Electric Plant in Service (\$19,466,147.54); Account 100.2, Electric Plant Leased to Others (\$1,943,804.02); and Account 100.3, Construction Work in Progress (\$87,828.95). The amounts as reclassified in Accounts 100.1 and 100.2 include fees paid by Pacific to American Power & Light Company, Electric Bond & Share Company and Phoenix Utility Company, all associated companies, pursuant to service contracts. These fees are permitted to remain tentatively in these accounts subject to such further consideration as may be deemed warranted at any time in the future.

The discussions herein relate to Pacific's revised reclassification and original cost study, and the disposition of amounts properly includible in Accounts 100.5 and 107. That study has not been entered in Pacific's books of account. We will order the study recorded and then adjusting entries made as hereinafter indicated so as to preserve appropriate accounting sequence.

The items upon which there have been no agreement present the following issues for our determination:

1. Whether the net amount of \$4,121,981.41, being the excess of the recorded cost on the books of Pacific over actual cost to its parent,

American, of property acquired from the latter, is a write-up;

2. The disposition of the amounts properly classifiable in Accounts 100.5 and 107;

3. Whether an amount of \$612,013.78, classified in an adjustment account within Account 108, Other Utility Plant, should be charged to Account 250, Reserve for Depreciation, or to Account 271, Earned Surplus.

JURISDICTION

Pacific concedes and the record shows that it owns and operates facilities used for the transmission of electric energy in interstate commerce and that it sells electric energy at wholesale in interstate commerce. It is, therefore, a "public utility" within the meaning of that term as used in the Federal Power Act.

THE WRITE-UP OF PACIFIC'S PLANT ACCOUNTS

The staffs of the Federal Power Commission and of the Oregon Commissioner have classified a net amount of \$4,121,981.41 in Account 107, Electric Plant Adjustments, as representing a write-up² of electric plant. Pacific contends that this amount

(2) The text of Account 107 reads, in part, as follows:

"* * * Write-ups of electric plant prior to the effective date of this system of accounts shall be recorded herein." Uniform System of Accounts Prescribed for Public Utilities and Licensees, p. 19.

should be classified in Account 100.5, Electric Plant Acquisition Adjustments.

It is undisputed that the amount in question originated as a result of two transactions between Pacific and its parent, American Power & Light Company, which took place in 1910 and 1930, and represents the excess of the net amount recorded by Pacific in respect to the properties transferred over the actual bona fide cost thereof to American.

Sometime near the close of the year 1909 and the early part of 1910, American Power & Light Company decided to move into the Pacific Northwest. Through the acquisition of capital stocks, it acquired control of certain utility properties in the Yakima Valley from the Northwest Light & Water Company and the Yakima Valley Power Company, and also the properties of Astoria Electric Company from Electric Bond & Share Company, which company had organized and controlled American. In March and April, 1910, American organized Yakima-Pasco Power Company and Columbia Power & Light Company, respectively, to take over the Yakima Valley Properties. Pacific concedes that American organized, owned and controlled the Astoria, Columbia and Yakima-Pasco companies.

On June 16, 1910, American organized Pacific for the sole purpose of taking over and operating the properties of Astoria, Columbia and Yakima-Pasco and in July 1910 these properties were transferred by American to Pacific, together with \$499,500 par value of stock of Walla Walla Valley

Railway Company. In exchange therefor Pacific delivered to American all of its outstanding securities consisting of \$1,250,000 par value preferred stock, \$5,997,000 par value of common stock, \$3,200,000 principal amount of First and Refunding Mortgage Bonds and assumed certain underlying bonds and current liabilities. These properties, which had cost American \$6,154,251.34, were set up in Pacific's plant account at \$10,900,000, or \$4,745,748.66³ in excess of their actual cost to American. This \$10,900,000 was nothing but a balancing figure to match par value and principal amount of securities which Pacific had issued to American, together with certain other minor obligations.

The record establishes beyond doubt that Pacific was at all times under the complete control and domination of American. American created Pacific, owned all of its common stock, officered it, capitalized it, and molded its actions at will. The board of directors of Pacific which, on July 23, 1910, "accepted" the offer of American for the transfer of the properties was composed of staff members or officers of American and its parent,

(3) The 1930 transaction between Pacific and American, in effect, reduced the 1910 excess of recorded cost over cost to American by \$623,767.25, to the net amount of \$4,121,981.41. In this transaction, American transferred to Pacific all of the properties of its wholly-owned subsidiary, Inland Power & Light Company, with the exception of the Ariel, Wallowa Falls and Cove hydroelectric projects, together with a large general office building in Portland, Oregon, and all of the outstanding shares of the common stock of Inland.

Electric Bond & Share Company, and persons associated with Bond & Share's law firm, Simpson, Thacher & Bartlett. These directors had been elected by the sole common stockholder, American. The transaction between American and Pacific was veiled through the use of an intermediary, one Weld M. Stevens, associated with Simpson, Thacher & Bartlett.

The complete domination of the July 23, 1910, transfer by American and the voiceless position of Pacific is demonstrated by a letter dated the same day, to Guy W. Talbot, Vice President of Pacific, from Sidney Z. Mitchell, Chairman of American's board, in which it was stated:

"While we (American Power & Light Company) have elected the foregoing as officers in the West, we have not as yet elected any Western directors because we want to keep the full Board here until we get through with all the votes relating to the issuance of bonds, etc. When this is all finished we will elect the permanent Board, a majority of which will be in the West and an Executive Committee the majority of which will be here."

The complete absence of arm's-length bargaining and of independence of judgment is further demonstrated by a telegram dated June 16, 1910 (the very date of incorporation of Pacific) disclosing that the amount at which the properties were to be transferred to Pacific had been decided upon even before Pacific had been organized.

The only reasonable conclusion that can be drawn from all the facts concerning the 1910 transfer of

property is that the transaction represented nothing more than American dealing with itself. The buyers and sellers were subject to common control and were mere tools of the holding company. No one in good conscience could make the claim that the excess of \$4,121,981.41 represents actual, bona fide cost. *Potomac Electric Power Co. v. Public Utilities Comm. of Dist. of Col.*, P. U. R. 1920C, 326, 337-8; *Re New York State Electric and Gas Corporation*, P. U. R. 1933D, 264.

Pacific concedes that a direct mark-up of assets is a write-up, but it would have us believe that the same result accomplished through the device of a new corporate entity validates the excess over cost to the parent seller. We will not permit such a subterfuge to obscure the real transaction or its purpose.⁴ We will look through the form to the substance.

In substance a fictitious increment was added to the accounts in a widely practiced but devious form:

“* * * the same result (write-up) may be, and has been, obtained in a more subtle manner. This was particularly so where holding companies were concerned. Often a write-up was created by causing one company to convey its assets to another company at a price in excess of the figure at which they were bought by the selling company, both com-

(4) “It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test.” *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 440 (1938).

panies at the time of transfer being subject to common control.”⁵

This aptly described the method followed by American.

If any doubt existed as to the true nature of the excess, an examination of the result to American would dispel it. Upon receipt of Pacific’s securities, American sold the bonds and preferred stock to the public and thereby reimbursed itself for practically all of the initial cost of acquiring the properties transferred to Pacific. Through the retention of all of Pacific’s common stock, which it did not sell to the public, American continued to own and control the properties at only a slight cost to itself. That was the very purpose of the transfer of the properties.

Pacific urges that the alleged “present fair value” of its property fully supports its security structure and therefore contends that the write-up should be permitted to remain in its plant account, or, to

(5) Report of the Committee on Corporate Finance of the National Association of Railroad and Utilities Commissioners, 1940, Appendix, p. 7, “Financing the Utility Property Account.” The article was written by Judge Healy, formerly Chief Counsel for the Federal Trade Commission during its investigation of the financial practices of holding companies and their operating subsidiaries, and now a member of the Securities and Exchange Commission. As Chief Counsel of the F.T.C., Judge Healy had an opportunity to observe at close range the financial manipulations of holding companies which were exposed by that investigation and led to the enactment of the Public Utility Act of 1935.

put it another way, that alleged values have caught up with and absorbed the write-ups and for that reason they should be left undisturbed. We were met by precisely such a contention In the Matter of Northwestern Electric Company, another subsidiary of American Power & Light Company. We disposed of that contention there, saying (Opinion No. 56-A, April 14, 1942) :

“It is asserted that we may not require the amortization of the \$3,500,000 write-up, inasmuch as the alleged present fair value of the property and assets of the Company exceeds the recorded amount for such property and assets, including this amount of \$3,500,000. Reduced to its simplest terms, the Company urges that its property account can be written up at will so long as it is able to support such manipulation by evidence of present fair value. By the same reasoning, it would follow that the plant accounts should be written down every time there is a decrease in plant values. The recognition in the plant accounts of declines in the so-called fair value of properties during the recent long and severe depression would probably have brought disaster to most public utilities. The amounts to be honestly and properly recorded in a utility’s plant account should not be permitted to oscillate with the ebb and flow of economic tides.

“It is thus erroneous to permit the Company’s plant accounts to reflect changing ‘values’ of the nature offered in evidence here and to use such estimates of ‘value’ in lieu of valid cost. Adherence to such a principle, with its ever shifting plant values,

would nullify the effective regulation of public utilities.

“Cost, not value, is the fundamental basis of accounting for public utility plant, as well as for plant of other enterprises. Our System of Accounts, like all accounting systems prescribed by regulatory agencies, is grounded firmly in the cost principle.”

Our views on that subject are unchanged.

We find, therefore, that the amount of \$4,121,981.41 is a write-up of electric plant and is properly classifiable in Account 107, Electric Plant Adjustments.

DISPOSITION OF THE WRITE-UP CLASSIFIABLE IN ACCOUNT 107

We have determined that the excess of \$4,121,981.41 does not represent a valid cost of property and is properly classifiable in Account 107. The provisions of Account 107 require the amounts recorded therein to be disposed of as we may approve or direct. We hold that, in accordance with sound principles of accounting, the amounts should be expunged immediately. We now turn to a consideration of disposition.

In Opinion No. 69, adopted on December 9, 1941, we approved, subject to certain conditions, the merger of Inland Power & Light Company with and into Pacific. In our order we required Pacific to set up a special reserve in the amount of \$1,135,113.91, being an amount by which the cost to Inland of the net assets transferred to Pacific exceeded Pacific's cost of the stock of Inland. We said in

Opinion No. 69 that this "reserve shall be used only for such purposes as this Commission may subsequently approve or direct." The transactions giving rise to the reserve are associated with transactions giving rise to the amount of \$4,121,981.41 classifiable in Account 107. We accordingly find that \$1,135,113.91 of the \$4,121,981.41 should be charged to this special reserve.

We direct that the balance of \$2,986,867.50 (\$4,121,981.41 less \$1,135,113.91) be charged to Earned Surplus; provided, however, that Pacific may at its election charge all or any part of the said \$2,986,867.50 against a Capital Surplus properly created for such purpose.

DISPOSITION OF AMOUNTS CLASSIFIED IN ACCOUNT 100.5, ELECTRIC PLANT AC- QUISITION ADJUSTMENTS

Pacific further classified an amount of \$2,741,591.66 in Account 100.5, Electric Plant Acquisition Adjustments. The staffs concur in this adjustment. It represents the amount paid for operating units or systems over and above the original cost of such operating units or systems acquired. The issue is whether such amount should be amortized over a reasonable period of time or permitted to remain indefinitely in Account 100.5.⁶ In Opinion No. 72,

(6) Account 100.5 provides, among other things, that the amounts recorded therein with respect to each property acquisition "shall be depreciated, amortized, or otherwise disposed of, as the Commission may approve, or direct."

St. Croix Falls Minnesota Improvement Company, et al., we held that similar amounts should be amortized over a reasonable period of time.

In this case there is substantial accord between Pacific⁷ and the staffs of this Commission and the Oregon Commissioner that the \$2,741,591.66 represents payment for intangibles, and we so find. The record shows that it is not at all feasible, and probably not possible, to segregate the intangibles according to their nature. Good will, going value, franchise value and monopoly value tend to merge.⁸ They are all rooted in and are associated with prospective earning power. See "The Law of Goodwill," G. A. D. Preinreich, 11 *Acctg. Rev.* 317, 326 (1936).

It is common knowledge that intangibles have questionable continuing value even in an unregulated industry. They should not be permitted to rest permanently in the accounts of a public utility, and the record of this case shows that the proper accounting treatment is to amortize them rapidly. The accepted and more desirable accounting practice, and

(7) Mr. Neill, Treasurer of Pacific, testified that he thought it was "fair to say that the amount paid by American in excess of the original cost for those properties represented payment for intangibles."

(8) Mr. Neill also testified as follows:

"Q. And all those types of intangible values, while it might be possible to segregate or pigeon-hole them, they all tend to merge?"

"A. I think so. I thought at one time that I would try to divide them up, and do a little speculating; but I found it would be highly speculative and an impracticable thing to do."

the one which we feel should be adhered to by public utilities is set forth in "A Statement of Accounting Principles":

"The writing off of such intangible assets as good will evokes scarcely any protest, even when it is recognized that substantial good will exists. The general distrust of good will and the knowledge that it has been widely used to capitalize exaggerated expectations of future earnings leave an almost universal feeling that the balance sheet looks stronger without it. When actual consideration has been paid for good will, it should appear on the company's balance sheet long enough to create a record of the fact in the history of the company as presented in a series of its annual reports. After that, nobody seems to regret its disappearance when accomplished by methods which fully disclose the circumstances." (p. 14)⁹

The foregoing statement refers to good will, but the authors indicate it is the most important and the typical intangible asset, and that a discussion of it applies to similar intangibles.¹⁰ The amounts involved herein have rested in the accounts ten to thirty years, which is more than adequate to create a record of the fact in the history of the company as contemplated by the foregoing quotation.

There is competent testimony of record that the

(9) "A Statement of Accounting Principles," (1938) Sanders, Hatfield and Moore. Published by American Institute of Accountants.

(10) *Ibid*, pp. 65-69.

amounts classified in Account 100.5 should be disposed of by annual charges to Account 537, Miscellaneous Amortization, over a period of 10 or 15 years. In view of the fact that the \$2,741,591.66 represents excess over original cost of acquisitions approximately half of which were made as far back as 1910 and have been carried on Pacific's books all those years without any provision having been made, as good accounting practice demands, for writing off any part thereof, we find that an amortization period of 10 years, beginning with 1942, is reasonable.

In disposing of the \$2,741,591.66, we find that such charges should be made to Account 537, Miscellaneous Amortization. St. Croix Cases. Opinion No. 72 (1942).

We find, therefore, that the amount classified in Account 100.5 represents payment for intangibles in excess of original cost and should be disposed of by equal annual charges over a period of ten years to Account 537, Miscellaneous Amortization, commencing with the year 1942.

DISPOSITION OF \$612,013.78 CLASSIFIED IN AN ADJUSTMENT ACCOUNT WITHIN ACCOUNT 108, OTHER UTILITY PLANT

In the course of the preparation of its reclassification and original cost studies, Pacific discovered that certain gas, water and railway properties had been

retired at an aggregate amount of \$612,013.78¹¹ less than the book cost. Pacific sought to correct this under-retirement by a charge to its depreciation reserves in the year 1940, although the balance existing in the company's depreciation reserves for non-electric properties amounted to only \$87,712.38.

The staffs of this Commission and the Oregon Commissioner contend that the 1940 charge to the depreciation reserve should be reversed, the amount of the under-retirement established in an adjustment account within Account 108, Other Utility Plant, and then disposed of by a charge of \$87,712.38 to Account 250, Reserve for Depreciation, and a charge of \$524,301.40 to Account 271, Earned Surplus. In other words, the Commissions' staffs contend the \$524,301.40 represents a loss on the sale of non-electric properties for which no provision existed in Pacific's depreciation reserve.

Pacific agrees that this amount of \$524,301.40 is properly chargeable to Account 271, Earned Surplus, but contends its depreciation reserve for its electric property in the State of Washington is in excess of present requirements in an amount sufficient to absorb the under-retirement, and that a charge to that reserve is, in effect, a charge to surplus, since surplus is understated to the extent of the alleged over-accrual.

(11) Pacific first determined that the under-retirement amounted to \$629,525.89 and the 1940 charge to the reserve was in that amount, but Pacific now concedes the correct adjustment, wherever it may be charged, is \$612,013.78.

The allowed over-adequacy of Pacific's depreciation reserve for electric properties in the State of Washington would not be determinative of the issues. There is good reason to hold that where a reserve has been provided for electric properties, chiefly by charges to electric expenses, the resulting reserve even though excessive should not be diverted in whole or in part to absorb a loss in some other department.

Assuming, *arguendo*, however, that Pacific's contention is correct in principle, it has failed to demonstrate the reserve for the electric property in the State of Washington is excessive. On the contrary, the evidence would appear to support the conclusion that the reserve is not excessive. For example, though Pacific's electric systems in the States of Oregon and Washington are substantially similar in type, character, and condition, the balance in the Oregon reserve is approximately one and one-half times greater percentagewise than the balance in the reserve earmarked for the Washington properties. Yet it is the Washington rather than the Oregon reserve that is claimed to be excessive. Other facts in the record also tend to show the total depreciation reserve for electric properties is not excessive.

In the light of the evidence, we cannot acquiesce in a charge-off of the amount in issue to the depreciation reserve, except to the extent of \$87,712.38 for which provision has been made.

We find, therefore, that the under-retirement should be corrected by requiring Pacific to transfer

from Account 250 to Account 271, Earned Surplus, the amount of \$524,301.40.

ACCOUNTING ADJUSTMENTS CONCEDED BY PACIFIC

(1) Additional Organization Expense

An amount of \$1,090.71 was included within Account 301, Organization, by the staffs prior to the hearing. The evidence offered at the hearing showed that in connection with the organization of Pacific expenditures of \$5,650.39 were incurred. We find, therefore, that an additional amount of \$4,559.68 should be established in Account 301, Organization, within Account 100.1, Electric Plant in Service, by transfer of such amount from Account 100.5, Electric Plant Acquisition Adjustments, in which latter account it has been included in Pacific's reclassification and original cost studies.

(2) Pacific's Investment in Stock of Inland Power & Light Company

In 1930, Pacific acquired the common capital stock of Inland in a "basket" transaction and included the amount thereof in its plant accounts. The evidence shows that cost to Pacific of such stock was \$232,002.22, which amount Pacific has established in Account 111, Investment in Associated Companies. The adjustment is approved.

(3) Unamortized Debt Discount and Expense

Pacific reclassified \$2,024,993.99 from its plant accounts to Account 140, Unamortized Debt Discount

and Expense, representing discount and expense suffered by American in disposing of Pacific's bonds received in the 1910 and 1930 transactions. The record shows that an additional amount of \$5,733.65, representing certain expenses incurred in connection with the bonds issued by Pacific to American in 1910, should be added to the foregoing amount, increasing it to \$2,030,727.64. (Pacific should have established the \$2,024,993.99, together with the amount of \$5,733.65, in Account 107 pending Commission approval of the transfer to Account 140.)

Of the \$2,030,727.64, an amount of \$454,349.90 relates to an indebtedness which matured in 1930 and was replaced by a new bond issue. This amount should be charged off to Account 271, Earned Surplus.

The balance of \$1,576,377.74 relates to Pacific's presently outstanding bonds which mature on August 1, 1955. As of December 31, 1941, 137/300 of the life of the bonds had expired, hence a pro rata portion of the unamortized debt discount and expense, \$719,875.46, should be charged off at once to Account 271, Earned Surplus, and Pacific should include in its income account for 1942 and subsequent years the proportionate part of the unamortized debt discount and expense applicable to such years until the entire amount is extinguished.

We find that \$5,733.65 should be transferred from Account 100.5 through Account 107, to Account 140; and \$1,174,225.36 from Account 140 to Account 271, Earned Surplus.

(4) Capital Stock Expense

Pacific has classified an amount of \$36,009.72, representing capital stock expense, in Account 151, Capital Stock Expense. While such amount should first have been established in Account 107, pending Commission approval of the transfer to Account 151, the result is correct and the adjustment is approved.

(5) Reinstatement of Fruitvale Canal

In 1932, the Fruitvale generating station and canal were retired by Pacific. Subsequently it was discovered that the canal was still used to supply water for irrigation to a number of customers under contract. The estimated amount of the retirement was \$229,166.81, the amount being predicated upon reproduction values. The staffs, pending a proper determination of cost, credited Account 250, Reserve for Depreciation, and reinstated the amount in Account 100.6, Electric Plant in Process of Reclassification.

The original cost of the canal property was determined to be \$188,136.86, and Pacific established this amount in Account 110, Other Physical Property, with a corresponding credit to Account 250, Reserve for Depreciation, leaving charged to the reserve \$41,029.95 (the difference between \$229,166.81 and \$188,136.86). The Company erroneously reduced Account 100.5 by this excessive retirement of \$41,029.95.

We find that the appropriate accounting procedure requires the establishment of \$188,136.86 in Account 110, and a transfer of \$41,029.95 from Account 250 to Account 100.5.

(6) Discount on Preferred Stock

In the 1910 transaction there was incurred a discount on preferred stock of \$161,500 and in the 1930 transaction \$25,000 which had never been reflected on Pacific's books. Pacific agrees that such discount should be reflected on its books. Accordingly, we find that \$186,500 should be transferred from Account 100.5, through Account 107, to Account 150, Discount on Capital Stock.

(7) Improper Charges to Production Plant

Sometime in 1912 Pacific commenced construction of a hydroelectric generating station on Hood River. The work was suspended in 1913 but construction costs were not closed to plant account until 1919. Included therein was \$44,769.73, representing interest accruals in excess of the amount applicable to the construction period, and \$9,734.80, representing charges for labor and other items incurred from 1914 to 1919 and improperly charged to plant account.

These charges, totaling \$54,504.53, were partially offset by improper credits for sales of material and equipment to the extent of \$11,949.85, thus reducing the improper charges to \$42,554.68.

Pacific has established this amount of \$42,554.68 in Account 107. We find such sum should be disposed of by a charge to Account 271, Earned Surplus.

(8) Miscellaneous Costs Walla Walla Valley Railway Company

In the organization of Walla Walla Valley Rail-

way Company by American in 1910, certain costs were incurred amounting to \$191.75. This amount was classified in Account 107 by the staffs and Pacific concedes that this is a proper classification. As Pacific disposed of its interest in the Walla Walla Valley Railway Company in 1921, the amount should be disposed of by a charge to Account 271, Earned Surplus.

AFFILIATED COMPANY FEES

The staff report, Exhibit No. 16 in this proceeding, shows that large fees paid by respondent to its parent companies and affiliated service companies have been charged to its plant accounts. It is likely that such fees contain an element of profit to the affiliates which should not be allowed. The staffs recommend that the fees be permitted to remain tentatively in the accounts because of the substantial additional analysis, particularly of the books of the affiliated companies, which would be required to ascertain the appropriate adjustments and the delay which would ensue.

We have consistently held that services rendered to licensees and public utilities by affiliates should be at cost and that all affiliated company profits included in fees and other charges should be removed from the plant accounts.¹² We take notice of the

(12) Opinion No. 4, Alabama Power Company; Opinion No. 11, Louisville Gas and Electric Company; Opinion No. 68, Pennsylvania Power & Light Company; Opinion No. 72, St. Croix Falls Minnesota Improvement Company, et al; Opinion No. 78, Puget Sound Power and Light Company.

fact that many other public utility subsidiaries of Electric Bond & Share Company have included in their plant accounts large fees for alleged services by that holding company, its sub-holding companies and affiliated service companies. The costs related to the fees for such alleged services which must be determined are not segregated by subsidiaries on the books of such holding or service companies. It would therefore seem more practical to examine the books and records of the holding companies and the affiliated service companies and make the necessary adjustments to all the public utility subsidiaries of Electric Bond & Share Company at one time, rather than to make the necessary studies and adjustments as each case arises. This procedure will prevent the over-lapping of effort and will insure more uniform determinations.

Accordingly, we reserve for a future time the investigation and studies necessary to eliminate from the plant accounts of the respondent the amounts included therein as profits on fees of approximately \$1,034,000 paid to its holding companies and affiliated service companies.

In our order of July 1, 1941, respondent was ordered to show cause why the Commission should not institute appropriate proceedings against the company, its officers or directors, for failure to comply with the provisions of Electric Plant Accounts Instruction 2-D of the Commission's Uniform System of Accounts and the Commission's Order dated May 11, 1937.

Respondent's officers and employees in the meantime have complied with our requirements and have shown an awareness of the obligations imposed upon them by the Federal Power Act. We do not believe any good purpose would be served by instituting further proceedings with respect to such matter.

An appropriate order will be issued in accordance with this opinion.

LELAND OLDS,

Chairman

CLAUDE L. DRAPER,

Commissioner

BASIL MANLY,

Commissioner

CLYDE L. SEAVEY,

Commissioner

I concur in result only.

JOHN W. SCOTT,

Commissioner

Dated at Washington, D. C., this 24th day of November, 1942.

LEON M. FUQUAY,

Secretary.

[Title of Commission and Cause.]

Commissioners Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

November 24, 1942

ORDER DIRECTING ACCOUNTING ENTRIES
AND DISPOSITION OF AMOUNTS IN
ACCOUNTS 100.5 AND 107

Upon consideration of the previous orders in this proceeding, the evidence adduced of record, the briefs and other documents filed, and having on this date made and entered its Opinion No. 84 with Findings, which is incorporated by reference as a part hereof;

The Commission orders that:

Pacific Power & Light Company (hereinafter referred to as "Pacific") record in its accounts the reclassification and adjusting entries proposed in its revised reclassification and original cost studies; and

The Commission further orders that:

(A) Pacific remove from Account 100.5, Electric Plant Acquisition Adjustments, and transfer to Account 107, Electric Plant Adjustments, the amount of \$4,121,981.41;

(B) Pacific dispose of the amount of \$4,121,981.41 established in Account 107, Electric Plant Adjustments, under Paragraph (A) above, by charging \$1,135,113.91 of that amount to the special reserve created pursuant to the Commission's Opinion No. 69; and by charging the balance of \$2,986,867.50 to Account 271, Earned Surplus; provided, however,

that Pacific may charge all or any part of said \$2,986,867.50 against a Capital Surplus properly created for that purpose;

(C) Pacific remove the amount of \$4,559.68 from Account 100.5, Electric Plant Acquisition Adjustments, and transfer said amount to Account 301, Organization, within Account 100.1, Electric Plant in Service;

(D) Pacific remove from Account 250, Reserve for Depreciation, and transfer to Account 100.5, Electric Plant Acquisition Adjustments, the amount of \$41,029.95, representing the over-retirement of the Fruitvale Canal;

(E) Pacific remove from Account 100.5, Electric Plant Acquisition Adjustments, and transfer to Account 150, Discount on Capital Stock (through Account 107), the amount of \$186,500, representing discount on preferred stock incurred by Pacific in 1910 and 1930;

(F) Pacific remove from Account 100.5, Electric Plant Acquisition Adjustments, and charge to Account 271, Earned Surplus (through Account 107), the amount of \$191.75, representing costs incurred in connection with the organization of Walla Walla Valley Railway Company;

(G) Pacific remove the amount of \$5,733.65 from Account 100.5, Electric Plant Acquisition Adjustments, and transfer said amount to Account 140, Unamortized Debt Discount and Expense (through Account 107);

(H) Pacific dispose of the amount of \$2,741,591.66 classified in Account 100.5, Electric Plant Acquisi-

tion Adjustments, by charging said amount to Account 537, Miscellaneous Amortization, in ten equal annual charges, commencing with the calendar year 1942;

(I) The transfer by Pacific of \$2,024,993.99 to Account 140 is approved;

(J) Pacific remove the amount of \$1,174,225.36 from Account 140 and charge said amount to Account 271, Earned Surplus, and account for the balance remaining in Account 140 in accordance with Balance Sheet Instruction 6-C;

(K) Pacific remove from Account 250, Reserve for Depreciation, and charge to Account 271, Earned Surplus (through Account 107), the amount of \$524,301.40, representing the loss, in excess of the applicable reserve for depreciation, from the sale or other disposition of non-electric properties prior to 1936;

(L) Pacific remove from Account 107 and charge to Account 271, Earned Surplus, the amount of \$42,554.68, representing improper charges to production plant in connection with the construction of a hydro-electric generating station on Hood River;

(M) The transfer of \$36,009.72, representing Capital Stock Expense, from Account 107 to Account 151, Capital Stock Expense, is approved;

(N) The transfer of \$232,002.22, representing investment in the stock of Inland, from Account 107, to Account 111, Investment in Associated Companies, is approved;

(O) Pacific file with the Commission on or before December 31, 1942, certified copies of the entries

required by Paragraphs (A) to (N), inclusive, of this order; and on or before March 15 of each year thereafter the entries required by Paragraph (H) of this order until the entire amount in Account 100.5 has been disposed of;

(P) The provisions of this order are not to be construed as dispensing with the necessity of full compliance with the requirements of the Public Utility Holding Company Act of 1935 and the rules, regulations and orders issued by the Securities and Exchange Commission.

By the Commission.

LEON M. FUQUAY,
Secretary.

[Title of Commission and Cause.]

APPLICATION FOR REHEARING

In respect of Paragraphs (A), (B), and (H) of Commission's Order of November 24, 1942.

Pacific Power & Light Company (herein referred to as Pacific), being aggrieved by certain provisions and requirements of the Order of the Commission herein, dated November 24, 1942, but issued on December 3, 1942, namely, the provisions and requirements of Paragraphs (A), (B), and (H) of said Order, respectfully applies, pursuant to the provisions of Section 313 (a) of the Federal Power Act (herein referred to as the Act), for a rehearing by the Commission herein upon the grounds hereinafter specifically set forth.

I.

Said Paragraphs of said Order direct that:

“(A) Pacific remove from Account 100.5, Electric Plant Acquisition Adjustments, and transfer to Account 107, Electric Plant Adjustments, the amount of \$4,121,981.41;

(B) Pacific dispose of the amount of \$4,121,981.41 established in Account 107, Electric Plant Adjustments, under Paragraph (A) above, by charging \$1,135,113.91 of that amount to the special reserve created pursuant to the Commission’s Opinion No. 69; and by charging the balance of \$2,986,867.50 to Account 271, Earned Surplus; provided, however, that Pacific may charge all or any part of said \$2,986,867.50 against a Capital Surplus properly created for that purpose;

(H) Pacific dispose of the amount of \$2,741,591.66 classified in Account 100.5, Electric Plant Acquisition Adjustments, by charging said amount to Account 537, Miscellaneous Amortization, in ten equal annual charges, commencing with the calendar year 1942;”

II.

Application for rehearing herein in respect of said Paragraph (A) is based upon the following grounds:

(1) The Commission erred in not classifying in Account 100.5, Electric Plant Acquisition Adjustments, the \$4,121,981.41 referred to in said Paragraph (A), since Pacific actually paid or incurred said amount of acquisition cost by the issuance of

its securities for properties and rights adjudged by Pacific to have a value equivalent to the amount of such securities so issued, and at a time when the exercise of such judgment was, and thereafter became, controlling as to the cost of the property so acquired and as to the validity of the securities issued in exchange therefor, as fully paid and non-assessable securities; and, by definition of Account 100.5, such acquisition costs so incurred is required to be classified in said Account 100.5.

(2) The Commission erred, in so ordering the reclassification of said \$4,121,981.41 in Account 107, instead of in Account 100.5 with other Electric Plant Acquisition Adjustments, by ignoring and by failing to take into account the great potential values in excess of cost to American Power & Light Company (herein referred to as American), which were inherent in the properties and enterprises turned over by American to Pacific in 1910, as envisaged by the organizers of Pacific at that time, and the existence of which values has been fully demonstrated by the record of Pacific's growth and of its performance in the interests of consumers and the public from 1910 to date.

(3) The Commission erred in failing to recognize that American was under no obligation in 1910, when all of said \$4,121,981.41 of acquisition cost was incurred, to part with or to transfer the properties and rights involved in its transactions with Pacific for a consideration aggregating less than American's appraisal of the fair value of such properties and rights, irrespective of their actual

cost to American; and the Commission's characterization of such acquisition cost as a "write-up" affords no lawful basis for differentiating such cost from other acquisition costs which are required by the Commission's Uniform System of Accounts to be classified in Account 100.5, Electric Plant Acquisition Adjustments.

(4) The Commission erred, while purporting to base its ordered reclassification in Account 107 of said \$4,121,981.41 of acquisition cost on the costs incurred by American, in disregarding and in failing to recognize the approximately \$4,000,000 of costs incurred by American upon the proposed Priest Rapids power development in furtherance and for the benefit of the properties and the enterprise transferred by it to Pacific in 1910.

III.

Application for rehearing herein in respect of Paragraph (B) of said Order is based upon the following grounds:

(1) The Commission erred in ordering Pacific to "dispose of" said amount of \$4,121,981.41 of acquisition cost, whether reclassified in Account 100.5 as Pacific maintains should be done, or in Account 107 as ordered by the Commission, for the reason that the Commission has no authority under the Act to require the elimination from the balance sheet of a public utility of asset values exceeding the Commission's determination of "original" or other cost of such items.

(2) The Commission erred in assuming that its authority under the Act extends retroactively to the

elimination from the accounts of a public utility of asset items lawfully established in the accounts of such public utility long prior to the time when the Commission was granted any authority with respect to the accounts of such utility.

(3) The Commission erred in ignoring, and in refusing to permit the introduction of, competent, relevant, and properly proffered evidence on the issue of disposition, which fully establishes that the fair value of Pacific's assets is equal to or in excess of the recorded book value thereof.

(4) The Commission erred, in violation of the vested property and constitutional rights of Pacific and its stockholders, preferred and common, in directing the elimination in whole or in part of Pacific's Earned Surplus created from lawfully earned income, thereby preventing the declaration or payment of dividends lawfully earned upon the capital stock of the Company, and without regard or consideration for the value of Pacific's assets.

(5) The Commission erred in suggesting or implying by said Paragraph (B) that Pacific has a practicable means of creating a Capital Surplus against which all or any part of said \$4,121,981.41 may be charged by Pacific, and thereby of avoiding the confiscatory and destructive effect upon Pacific and its stockholders of the charge to Earned Surplus ordered by the Commission by said Paragraph (B).

IV.

Application for rehearing herein in respect of Paragraph (H) of said Order is based upon the following grounds:

(1) Upon the grounds hereinbefore set forth under subparagraphs (1), (2), (3), and (4) of paragraph III hereof.

(2) Upon the ground that the \$2,741,591.66 of the amount in Pacific's Account 100.5, ordered by the Commission to be disposed of by amortization in ten equal annual charges to or deductions from income, represents admitted actual most of and investment in Pacific's present assets, whether or not such assets be characterized as "intangible" assets; and as such, said \$2,741,591.66 of admitted actual cost and investment may not lawfully be required to be "written off" or disposed of, so long as the assets purchased at such cost remain the property of Pacific.

(3) Upon the ground that to require such amortization, of said \$2,741,591.66 of admitted actual cost and investment in Pacific's assets, would unlawfully and unconstitutionally deprive Pacific of the right to declare and pay, and its stockholders, preferred and common, of the right to receive, dividends lawfully earned upon Pacific's preferred and common stocks, to the extent that such amortization at the rate of \$274,159.17 per year for ten years, beginning with the year 1942, will necessarily divert such lawful earnings to such other arbitrarily and unlawfully prescribed purpose.

(4) Upon the ground that such amortization of said \$2,741,591.66 of admitted actual investment constitutes an unjust and unlawful discrimination by the Commission against Pacific and against Pacific's preferred stockholders, in that in the case of

Northwestern Electric Company (Docket No. IT-5642) the Commission, in dealing with \$3,500,000 of alleged "write-up" classified by it in Account 107 (which according to the Commission's standards is not entitled to recognition comparable with amounts properly classified in Account 100.5), ordered that such alleged "write-up" be disposed of by charges to the income available to said utility after preferred dividend appropriations, which the Commission's Opinion No. 56-A dated April 14, 1942, in that proceeding, and its recent brief on the appeal now pending before the Circuit Court of Appeals for the 9th Circuit, indicate was intended by the Commission to mean after preferred dividend requirements, a discrimination which is highly prejudicial to Pacific and to its preferred stockholders, and for which there can be no lawful justification.

V.

As reported to the Commission in Pacific's Application of December 22, 1942, for a Stay of said Order with respect to the requirements of said Paragraphs (A), (B), and (H), Pacific has already made or is currently making all of the entries required by the various other provisions of said Order of November 24, 1942, and will have filed with the Commission on or before December 31, 1942, certified copies of all such entries; and this application is limited to the aforementioned provisions of said Order by which Pacific deems itself aggrieved as set forth herein.

Pacific respectfully submits that the grounds hereinbefore set forth in this application for re-

hearing are fully sustained by the record herein, by the Act under which the Commission derives such authority as it possesses with respect to Pacific's accounts, and by the Constitution of the United States, particularly Amendment V thereof; and Pacific therefore requests that such rehearing be granted, and that, following such rehearing, the Commission shall enter its further order herein relieving Pacific from the provisions and requirements of said Paragraphs (A), (B), and (H) of said Order of November 24, 1942.

Respectfully,

PACIFIC POWER & LIGHT
COMPANY

WILL T. NEILL

Vice President

LAING GRAY & SMITH

JOHN A. LAING

Public Service Building

Portland, Oregon

Attorneys for Pacific Power & Light Company
(Duly Verified.)

Federal Power Commission. Dec. 31, 1942. Received.

[Title of Commission and Cause.]

APPLICATION FOR REHEARING

In respect of Paragraphs (A), (B), and (H) of
Commission's Order of November 24, 1942.

American Power & Light Company (herein re-

ferred to as American), the owner of all the outstanding common stock of Pacific Power & Light Company (herein referred to as Pacific), being aggrieved by certain provisions and requirements of the Order of the Commission herein, dated November 24, 1942, but issued on December 3, 1942, namely the provisions and requirements of Paragraphs (A), (B), and (H) of said Order, respectfully applies, pursuant to the provisions of Section 313 (a) of the Federal Power Act (herein referred to as the Act), for a rehearing by the Commission herein upon the grounds hereinafter specifically set forth.

I.

Said Paragraphs of said Order direct that:

“(A) Pacific remove from Account 100.5, Electric Plant Acquisition Adjustments, and transfer to Account 107, Electric Plant Adjustments, the amount of \$4,121,981.41;

(B) Pacific dispose of the amount of \$4,121,981.41 established in Account 107, Electric Plant Adjustments, under Paragraph (A) above, by charging \$1,135,113.91 of that amount to the special reserve created pursuant to the Commission's Opinion No. 69; and by charging the balance of \$2,986,867.50 to Account 271, Earned Surplus; provided, however, that Pacific may charge all or any part of said \$2,986,867.50 against a Capital Surplus properly created for that purpose;

(H) Pacific dispose of the amount of \$2,741,-

591.66 classified in Account 100.5, Electric Plant Acquisition Adjustments, by charging said amount to Account 537, Miscellaneous Amortization, in ten equal annual charges, commencing with the calendar year 1942;”

II.

Application for rehearing herein in respect of said Paragraph (A) is based upon the following grounds:

(1) The Commission erred in not classifying in Account 100.5, Electric Plant Acquisition Adjustments, the \$4,121,981.41 referred to in said Paragraph (A), since Pacific actually paid or incurred said amount of acquisition cost by the issuance of its securities for properties and rights adjudged by Pacific to have a value equivalent to the amount of such securities so issued, and at a time when the exercise of such judgment was, and thereafter became, controlling as to the cost of the property so acquired and as to the validity of the securities issued in exchange therefor, as fully paid and non-assessable securities; and, by definition of Account 100.5, such acquisition cost so incurred is required to be classified in said Account 100.5.

(2) The Commission erred, in so ordering the reclassification of said \$4,121,981.41 in Account 107, instead of in Account 100.5 with other Electric Plant Acquisition Adjustments, by ignoring and by failing to take into account the great potential values in excess of cost to American, which were inherent in the properties and enterprises turned over by American to Pacific in 1910, as envisaged

by the organizers of Pacific at that time, and the existence of which values has been fully demonstrated by the record of Pacific's growth and of its performance in the interests of consumers and the public from 1910 to date.

(3) The Commission erred in failing to recognize that American was under no obligation in 1910, when all of said \$4,121,981.41 of acquisition cost was incurred, to part with or to transfer the properties and rights involved in its transactions with Pacific for a consideration aggregating less than American's appraisal of the fair value of such properties and rights, irrespective of their actual cost to American, but was under a positive obligation to obtain the full value in accordance with such appraisal since the transfer contemplated that persons other than security holders of American would acquire an interest in Pacific; and the Commission's characterization of such acquisition cost as a "write-up" affords no lawful basis for differentiating such cost from other acquisition costs which are required by the Commission's Uniform System of Accounts to be classified in Account 100.5, Electric Plant Acquisition Adjustments.

(4) The Commission erred, while purporting to base its ordered reclassification in Account 107 of said \$4,121,981.41 of acquisition cost on the costs incurred by American, in disregarding and in failing to recognize the approximately \$4,000,000 of costs incurred by American upon the proposed Priest Rapids power development in furtherance

and for the benefit of the properties and the enterprise transferred by it to Pacific in 1910.

III.

Application for rehearing herein in respect to Paragraph (B) of said Order is based upon the following grounds:

(1) The Commission erred in ordering Pacific to "dispose of" said amount of \$4,121,981.41 of acquisition cost, whether reclassified in Account 100.5 as Pacific maintains should be done, or in Account 107 as ordered by the Commission, for the reason that the Commission has no authority under the Act or the Constitution of the United States to require the elimination from the asset side of the balance sheet of a public utility of any sum fully supported by the present fair value of its assets, although in excess of the Commission's determination of "original" or other cost.

(2) The Commission erred in assuming that its authority under the Act extends retroactively to the elimination from the accounts of a public utility of asset items lawfully established in the accounts of such public utility long prior to the time when the Commission was granted any authority with respect to the accounts of such utility.

(3) The Commission erred in ignoring, and in refusing to permit the introduction of, competent, relevant, and properly proffered evidence on the issue of disposition, which fully establishes that the fair value of Pacific's assets is equal to or in excess of the recorded book value thereof.

(4) The Commission erred, in violation of the vested property and constitutional rights of Pacific and its stockholders, preferred and common, in directing the elimination in whole or in part of Pacific's Earned Surplus created from lawfully earned income, thereby preventing the declaration or payment of dividends lawfully earned upon the capital stock of the Company, and without regard or consideration for the value of Pacific's assets.

(5) The Commission erred in suggesting or implying by said Paragraph (B) that Pacific has a practicable means of creating a Capital Surplus against which all or any part of said \$4,121,981.41 may be charged by Pacific, and thereby of avoiding the confiscatory and destructive effect upon Pacific and its stockholders of the charge to Earned Surplus ordered by the Commission by said Paragraph (B), since the creation of such a capital surplus would require American involuntarily to renegotiate its original sales contracts and to surrender vested rights of long standing without consideration and in violation of the Fifth Amendment to, and Sections 1 and 2 of Article III of, the Constitution.

IV.

Application for rehearing in respect of Paragraph (H) of said Order is based upon the following grounds:

(1) Upon the grounds hereinbefore set forth under subparagraphs (1), (2), (3), and (4) of paragraph III hereof.

(2) Upon the ground that the \$2,741,591.66 of the amount in Pacific's Account 100.5, ordered by

the Commission to be disposed of by amortization in ten equal annual charges to or deductions from income, represents admitted actual cost of and investment in Pacific's present assets, whether or not such assets be characterized as "intangible" assets; and as such, said \$2,741,591.66 of admitted actual cost and investment may not lawfully be required to be "written off" or disposed of, so long as the assets purchased at such cost remain the property of Pacific.

(3) Upon the ground that to require such amortization, of said \$2,741,591.66 of admitted actual cost and investment in Pacific assets, would unlawfully and unconstitutionally deprive Pacific of the right to declare and pay, and its stockholders, preferred and common, of the right to receive, dividends lawfully earned upon Pacific's preferred and common stocks, to the extent that such amortization at the rate of \$274,159.17 per year for ten years, beginning with the year 1942, will necessarily divert such lawful earnings to such other arbitrarily and unlawfully prescribed purpose.

V.

Application for rehearing herein in respect of Paragraphs (A), (B) and (H) is further based on the following grounds:

(1) The Commission in issuing such orders has exceeded the scope of its regulatory authority over Pacific under the Act and in contravention of the Fifth and Tenth Amendments of the Constitution and Sections 1 and 2 of Article III of the Constitution and has infringed upon the regulatory author-

ity reserved to the States by said Act and the Tenth Amendment to the Constitution.

(2) The Commission in issuing such orders has required Pacific to record its assets on its books at less than their present fair value and to the extent the Commission makes use of such revised books of account as a basis for regulating rates and dividends and for purposes of condemnation, it will exceed the powers granted to it under the Act and will violate the Fifth and Tenth Amendments to the Constitution and Sections 1 and 2 of Article III of the Constitution.

(3) The Commission erred in failing to find (a) that the costs of the various businesses, properties and values inherent in the acquisition transactions between Pacific and American was the amount recorded on the books of Pacific, (b) that the amounts so recorded are fully covered and represented by assets having a value in excess of such amounts, and (c) that the entire difference between the original cost and the cost recorded on the books of Pacific should be placed in Account 100.5; and further erred in ordering the classification of a portion of such difference in Account 107, as required by Paragraph (A) of said Order, and in ordering the disposition of any part of said difference, as required by Paragraphs (B) and (H) of said Order, on the grounds that such failures to find and such orders are arbitrary and capricious, violate the Fifth and Tenth Amendments to the Constitution, constitute the taking of property for a public purpose without payment of just compensa-

tion and are contrary to the provisions of Sections 1 and 2 of Article III of the Constitution and the Constitutional guarantees of due process and of the judicial determination of fundamental questions of fact and law.

American respectfully submits that the grounds hereinbefore set forth in this application for rehearing are fully sustained by the record herein, by the Act under which the Commission derives such authority as it possesses with respect to Pacific's accounts, and by the Constitution of the United States; and American therefore requests that such rehearing be granted, and that, following such rehearing, the Commission shall enter its further order herein relieving Pacific from the provisions and requirements of said Paragraphs (A), (B), and (H) of said Order of November 24, 1942.

Respectfully,

AMERICAN POWER & LIGHT
COMPANY

By H. L. ALLER
President

REID & PRIEST

2 Rector Street
New York, N. Y.

WHITE & CASE

14 Wall Street
New York, N. Y.

Attorneys for American Power & Light
Company, Intervenor.

(Duly Verified.)

Federal Power Commission. Extra Copy. Dec. 31,
1942. Received.

United States of America
Federal Power Commission

Commissioners Leland Olds, Chairman, Claude L.
Draper, Basil Manly, John W. Scott and Clyde
L. Seavey.

January 13, 1943

Docket No. IT-5611

In the Matter of

PACIFIC POWER & LIGHT COMPANY

ORDER DENYING REHEARING

Upon consideration of the previous orders in this proceeding, all evidence adduced of record, the briefs and other documents filed, Opinion No. 84 and the order of November 24, 1942, and the applications for rehearing filed on December 31, 1942, by Pacific Power & Light Company and American Power & Light Company; and

It appearing that the assignments of error do not raise any new questions of fact or of law which have not been previously raised by Pacific and American and previously considered by the Commission prior to its adoption of the order in question;

The Commission orders that:

The applications for rehearing of Pacific Power & Light Company and American Power and Light Company be and they are hereby denied; provided, however, that the consideration of American's application for rehearing and the Commission's action

thereon shall not be construed as recognition by the Commission that American's interests are such that it may be "aggrieved by an order issued by the Commission" as provided in Section 313 of the Federal Power Act.

By the Commission.

LEON M. FUQUAY,
Secretary.

Pacific Power & Light Company
Public Service Building

Portland, Oregon

December 24, 1942

Federal Power Commission
Washington, D. C.

Gentlemen:

Enclosed are certified copies of the entries posted on the books of this Company to "record in its accounts the reclassification and adjusting entries proposed in its revised reclassification and original cost studies", in accordance with the requirements of Opinion No. 84 and Order of the Federal Power Commission, dated November 24, 1942, in Docket No. IT-5611, together with copy of reconciliation sheet pertaining thereto.

These entries cover all of the various reclassifications and entries required by said Order, except those required by Paragraphs (A), (B) and (H), with respect to which the Company is currently

applying for a rehearing, and for a stay of these provisions pending rehearing and final determination.

Very truly yours,

J. G. HAWKINS

Secretary and Treasurer

JGH:ar

Encls.

Pacific Power & Light Company
Public Service Building
Portland, Oregon

Certificate Re Entries
Recorded Pursuant to Requirements of
Order Dated November 24, 1942, in
FPC Docket No. IT-5611

To the Federal Power Commission:

I, J. G. Hawkins, Treasurer of Pacific Power & Light Company, Do Hereby Certify that the attached are full and true copies of the several accounting entries, each identified by the description thereof, which have been made by said Company on its books as of the several dates shown for said entries, by me or under my supervision as Treasurer of said Company, pursuant to or in accordance with the requirements of Opinion No. 84 and

Order of the Federal Power Commission in Docket No. IT-5611, dated November 24, 1942, together with copy of reconciliation sheet pertaining thereto, namely:

Journal Entry Voucher No. 7726, dated December 31, 1941

Journal Entry Voucher No. 7727, dated December 31, 1941

Journal Entry Voucher No. 7728, dated December 31, 1941

Journal Entry Voucher No. 9476, dated December 17, 1942

Journal Entry Voucher No. 9477, dated December 17, 1942

Witness my hand and the seal of said corporation this 24th day of December, 1942.

[Seal]

J. G. HAWKINS

Pacific Power & Light Company

JOURNAL ENTRY VOUCHER No. 7726

December 31, 1941

	Debit	Credit
	\$	\$
Miscellaneous Debits to Surplus,		
414	42,746.43	
To		
Utility Plant in Process		
of Reclassification, 100.6		42,476.43
To record accounting adjustment required in reclassification of utility plant account as prescribed in System of Accounts effective January 1, 1937, dis-		

closed in record of Federal Power Commission cause Docket IT-5611, but not heretofore recorded on the books of account of the Company.

Expenditures erroneously charged to plant account in connection with construction of Powerdale, Oregon, hydro-electric generating plant\$42,554.68

Expenditures incurred in acquisition of investment in Walla Walla Valley Railway Company erroneously included in utility plant account and not retired upon sale of investment\$191.75

This entry recorded pursuant to authorization and approval of the Company's board of directors as stated in minutes of meeting of said board held January 8, 1942.

Certified Correct:

/s/ CLAUSE R. GROTH

Approved:

/s/ J. G. HAWKINS

Pacific Power & Light Company
JOURNAL ENTRY VOUCHER No. 7727

December 31, 1941

	Debit	Credit
	\$	\$
Unamortized Debt Discount and Expense, 140	2,030,727.64	
Dr To		
Utility Plant in Process of Reclassification, 100.6		1,053,117.15
Investments in Affiliated Interests, 111		977,610.49

To record the unamortized bond discount and expense disclosed in the original cost study filed with the Federal Power Commission but not heretofore recorded as such on the books.

First and Refunding Mortgage
5% Gold Bonds issued 8/1/10
due 8/1/30\$454,349.90

First Mortgage & Prior Lien
Gold Bonds 5% Series issued
8/1/30 due 8/1/55 \$1,576,377.74

This entry recorded pursuant to authorization and approval of the Company's board of directors as stated in minutes of meeting of said board held January 8, 1942.

Certified Correct:

/s/ CLAUSE R. GROTH

Approved:

/s/ J. G. HAWKINS

Pacific Power & Light Company

JOURNAL ENTRY VOUCHER No. 7728

December 31, 1941

	Debit	Credit
	\$	\$
Miscellaneous Debits to Surplus,		
414	1,111,173.96	
Amortization of Debt Discount		
and Expense, 531	63,055.11	
Dr To		
Unamortized Debt Discount		
and Expense, 140.....		1,174,229.07

To record amortization of bond discount and expense applicable to the following issues:

First and Refunding Mortgage
 5% Gold Bonds issued 8/1/10
 due 8/1/30 (entire) \$454,349.90

First Mortgage & Prior Lien
 Gold Bonds 5% Series issued
 8/1/30 due 8/1/55 (137/300
 of \$1, 576,377.74) \$719,879.17

This entry recorded pursuant to authorization and approval of the Company's board of directors as stated in minutes of meeting of said board held January 8, 1942.

Certified Correct:

/s/ CLAUSE R. GROTH

Approved:

/s/ J. G. HAWKINS

Pacific Power & Light Company
 JOURNAL ENTRY VOUCHER No. 9476

December 17, 1942

	Debit	Credit
	\$	\$
Utility Plant in Service, E-100.1	19,470,707.22	
Utility Plant in Service, W 100.1	129,191.35	
Utility Plant Leased to Others, E 100.2	1,943,804.02	
Construction Work in Progress, 100.3		
Utility Plant Acquisition Ad- justments, E 100.5	6,863,573.07	
Utility Plant Acquisition Ad- justments, W 100.5.....	7,888.76	
Utility Plant in Service, S 100.1	71,543.29	
Other Physical Property, 110....	2,468,068.52	
Investments in Associated Com- panies, 111		

Unamortized Debt Discount and Expense, 140	
Capital Stock Expense, 151.....	36,009.72
Discount on Capital Stock, 150	186,500.00
Retirement (Depreciation) Re- serve, 250	295,134.59
to	
Utility Plant in Process of Reclassification, 100.6	31,472,420.54

To record on books of account the reclassification of utility plant accounts as proposed by the Company in its revised reclassification and original cost studies, pursuant to Instruction 2-D, Utility Plant Accounts, of System of Accounts of Public Utilities Commissioner of Oregon (and Instruction 2-D, Electric Plant Accounts, of Federal Power Commission), and pursuant to Federal Power Commission Opinion No. 84 and Order dated November 24, 1942. (Docket No. IT-5611)

Certified Correct:

/s/ CLAUSE R. GROTH

Approved:

/s/ J. G. HAWKINS

Pacific Power & Light Company

JOURNAL ENTRY VOUCHER No. 9477

December 17, 1942

	Debit	Credit
	\$	\$
Miscellaneous Debits to Surplus,		
414	524,301.40	
To		
Retirement (Depreciation)		
Reserve, 250		524,301.40

To transfer from above credit account an amount representing the loss, in excess of the applicable reserve for retirements, from the sale or other disposition of non-electric properties of the Company prior to 1936, as identified in the record of the matter of the Company's reclassification and original cost studies in FPC case, Docket No. IT-5611.

This adjustment prescribed by FPC Opinion No. 84 and Order dated November 24, 1942. Paragraph (K) of said Order.

Certified Correct:

/s/ CLAUSE R. GROTH

Approved:

/s/ J. G. HAWKINS

Federal Power Commission, Dec. 28, 1942. Received.

Federal Power Commission. Docketed Dec. 28, 1942. C. J.

Pacific Power & Light Company

RECONCILIATION OF FPC OPINION No. 84 AND ORDER DATED NOVEMBER 24, 1942, WITH ENTRIES MADE PURSUANT THERETO ON COMPANY'S BOOKS

	Reclassification Proposed by Co. 10-20-42	Adjustment by Stipulation Op.No.84-pp.16-18	Date	Reference	Prior Adjustments			December 1942 Adjustments, J.E.		
					Amount	No.	Account Title	Amount	No.	Account Title
Utility Plant in Service, E 100-1.....	19,470,707.22							19,470,707.22	E 100-1	Utility Plant in Service
Utility Plant Leased to Others, E 100-2.....	1,943,804.02							1,943,804.02	E 100-2	Utility Plant Leased to Others
Construction Work in Progress, 100-3.....	87,828.95		12-31-37	JE 427	87,828.95					
Utility Plant Acquisition Adjustments, 100-5.....	6,863,573.07							6,863,573.07	100-5	Utility Plant Acquisition Adjust.
Utility Plant Adjustments, 107.....	42,746.43		12-31-41	JE 7726	42,746.43	414	Miscellaneous Debits to Surplus			
Other Utility Plant, 108 (1).....	208,701.10									
Other Physical Property, 110.....	2,468,068.52		5-29-42	JE 8483A	232,002.22		Obligation to cancel Capital Stock of Inland Power & Light Company in merger	2,468,068.52	110	Other Physical Property
Investments in Affiliated Interests, 111.....	232,002.22									
Unamortized Debt Discount and Expense, 140.....	2,030,727.64		12-31-41	JE 7727	2,030,727.64	140	Unamortized Debt Discount and Expense			
Capital Stock Expense, 151.....	36,009.72							36,009.72	151	Capital Stock Expense
Retirement Reserve, 250	382,846.97	63,406.58						295,134.59	250	Retirement (Depreciation) Reserve
0		24,305.80								
Discount on Capital Stock, 151.....	186,500.00							186,500.00	151	Discount on Capital Stock
Total Utility Plant in Process of Reclassification, 100-6 as of January 1, 1937.....	\$33,953,515.86									
(1) PUC of Oregon System of Accounts includes no Account 108, Other Utility Plant, so above amount under that caption is distributed as follows										
Utility Plant in Service, W 100-1.....								129,191.35	W 100-1	Utility Plant in Service, Water
Utility Plant in Service, S 100-1.....								71,543.29	S 100-1	Utility Plant in Service, Steam
Construction Work In Progress, 100-3.....			12-31-37	JE 427	77.70					
Utility Plant Acquisition Adjustments, W 100-5								7,888.76	W 100-5	Utility Plant Acquisition Adjustments, Water
Totals.....	\$33,953,515.86	\$ 87,712.38			\$2,393,382.94			\$31,472,420.54		

Prepared December 17, 1942

In the
United States Circuit Court of Appeals
For the Ninth Circuit

PACIFIC POWER & LIGHT COMPANY,

and

AMERICAN POWER & LIGHT COMPANY,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR REVIEW OF ORDER OF
FEDERAL POWER COMMISSION

To the Honorable, The United States Circuit Court
of Appeals for the Ninth Circuit, and to the
Judges Thereof:

Pacific Power & Light Company (hereinafter referred to as "Pacific") and American Power & Light Company (hereinafter referred to as "American"), the Petitioners herein, being aggrieved by the Order of the Federal Power Commission (hereinafter referred to as the "Commission"), dated November 24, 1942, in the proceeding bearing said Commission's Docket No. IT-5611, and by the denial by said Commission of Petitioners' applications for rehearing filed in said proceeding on December 31, 1942, which applications were denied by said Commission by order entered January 13, 1943, but not

served until January 17, 1943, hereby respectfully petition and show:

I.

Pacific is a corporation organized under the laws of the state of Maine, and is doing business as a public utility or public service company in the states of Oregon and Washington, under and by virtue of compliance with the laws of said states, respectively, and has been so engaged in such business in said states since the month of July, 1910. The property of Pacific comprises both electric and non-electric facilities, and its electric facilities include certain transmission lines extending across the boundary line between said states of Oregon and Washington. As the owner of such transmission facilities, Pacific is a "public utility" as defined in Section 201 of the Federal Power Act, and is subject to the jurisdiction of the Commission to the extent specified by the provisions of said Act. Pacific is subject to comprehensive regulation by the states of Oregon and Washington, respectively, as to accounting, rates adequacy of service, contracts with affiliated interests, and every other aspect of its business which concerns the general public.

II.

American is a corporation organized under the laws of the state of Maine, having an executive office at Two Rector Street, New York, New York. American is a public utility holding company registered as such under the Public Utility Holding Company Act of 1935, and owns 1,000,000 shares of

the no-par-value common stock of Pacific, having a stated value on the books of Pacific of \$7.00 per share, being all of said common stock issued and outstanding.

American acquired said common stock of Pacific as the result of certain transactions between American and Pacific in the years 1910, 1915, and 1930 respectively, whereby American caused to be transferred to Pacific certain properties, securities, and cash, receiving in exchange therefor securities issued by Pacific, including certain bonds and certain shares of preferred stock of Pacific which were sold by American to the public, as contemplated at the time of the transactions, and including various issues of common stock which were converted into said 1,000,000 shares of common stock as a part of the 1930 transaction.

III.

The Commission is the administrative body entrusted with the administration of the Federal Power Act, 16 U. S. C. A. §§791 et seq., hereinafter sometimes referred to as the "Act". The Commission is authorized by the terms of the Act to investigate and ascertain the actual legitimate cost of the property of public utilities and the fair value of such property, to require that every public utility file a statement of the original cost of its property, to determine the fair value of projects already constructed for which license is sought, and to prescribe a uniform system of accounts to be kept by licensees and public utilities. The Commis-

sion is authorized by the terms of the Act to make determinations with respect to certain rates, security issues, the acquisition or disposition of property, and certain other matters, all such regulatory authority being subject, however, to the restrictions and limitations set forth in the Act.

IV.

The Commission, by its order Number 42 adopted June 16, 1936, as amended, prescribed its "Uniform System of Accounts" for public utilities and licensees. Said System of Accounts, as supplemented by the Commission's order of May 11, 1937, directed (by Electric Plant Accounts Instruction 2-D) all public utilities, including Pacific, to reclassify their electric plant accounts, and to submit to the Commission certain statements showing pro forma a reclassification of their electric plant accounts in accordance with the provisions of said System of Accounts.

V.

Said System of Accounts, so adopted by the Commission on June 16, 1936, and the reclassification of accounts so directed by said Instruction 2-D and by the Commission's said order of May 11, 1937, were and are based exclusively upon the so-called "original cost" of each unit of utility property, such "original cost" being defined in said System of Accounts as "the cost of such property to the person first devoting it to public service." Pacific's accounts at all times have accurately recorded such "original cost" of all property constructed or first

applied by it to public service; but a large part of Pacific's electric utility property was not constructed or first so applied by it, and had been purchased by Pacific, along with other properties, as assembled local operating enterprises, from prior owners thereof (there were 145 such prior owners); and, in the majority of cases, the books and records of such prior owners with respect to such property were either not available to Pacific, or, if available in whole or in part, were not adequate or acceptable records of such original cost. Further serious difficulties confronted Pacific in attempting to determine such original cost, and to reclassify Pacific's property on the basis thereof, because of the retirement or replacement of many thousands of items of such purchased property, during the approximately thirty years of Pacific's operations prior to the making of such reclassification, and because identification of such retired or replaced items (as between purchased and constructed units) was impracticable, if not wholly impossible.

VI.

After certain preliminary proceedings before the Commission, followed by the filing by Pacific on July 3, 1940, of a tentative reclassification of its electric plant accounts in response to said order of May 11, 1937, and later by the filing with the Commission of a so-called "joint report" by the staffs of the Commission and the Public Utilities Commissioner of Oregon, pertaining to the tentative reclassification so filed by Pacific, the Commission

entered an order on July 1, 1941, requiring Pacific, among other things, to show cause why Pacific should not make the accounting adjustments proposed in such joint report, and further requiring Pacific to submit appropriate plans for the "disposition" of such amounts as might be established in so-called "Account 100.5, Electric Plant Acquisition Adjustments", and so-called "Account 107, Electric Plant Adjustments".

VII.

On September 26, 1941, Pacific completed and delivered to the Commission copies of Pacific's then proposed revised reclassification of its electric plant accounts, and of its further and revised original cost studies upon which said proposed revised reclassification was based; and such revised reclassification and original cost studies (Exhibit 17 in said proceeding No. IT-5611), together with said joint report of the staffs of the Commission and the Oregon Commissioner, were presented at a hearing in said proceeding held by the Commission at Portland, Oregon, from September 29, 1941, to October 8, 1941. Prior to said hearing, permission to intervene in said proceeding was granted by the Commission to American, one of the Petitioners herein.

VIII.

On December 3, 1942, the Commission issued its Opinion No. 84, and its Order based on such opinion, said Opinion and said Order being dated November 24, 1942, and said Order prescribing, among

other things not pertinent to this review, as follows:

“The Commission orders that:

Pacific Power & Light Company (hereinafter referred to as “Pacific”) record in its accounts the reclassification and adjusting entries proposed in its revised reclassification and original cost studies; and

The Commission further orders that:

(A) Pacific remove from Account 100.5, Electric Plant Acquisition Adjustments, and transfer to Account 107, Electric Plant Adjustments, the amount of \$4,121,981.41;

(B) Pacific dispose of the amount of \$4,121,981.41 established in Account 107, Electric Plant Adjustments, under Paragraph (A) above, by charging \$1,135,113.91 of that amount to the special reserve created pursuant to the Commission’s Opinion No. 69; and by charging the balance of \$2,986,867.50 to Account 271, Earned Surplus; provided, however, that Pacific may charge all or any part of said \$2,986,867.50 against a Capital Surplus properly created for that purpose.

* * * * *

(H) Pacific dispose of the amount of \$2,741,591.66 classified in Account 100.5, Electric Plant Acquisition Adjustments, by charging said amount to Account 537, Miscellaneous Amortization, in ten equal annual charges, commencing with the calendar year 1942;

* * * * *

(O) Pacific file with the Commission on or before December 31, 1942, certified copies of the en-

tries required by Paragraphs (A) to (N), inclusive, of this order; and on or before March 15 of each year thereafter the entries required by Paragraph (H) of this order until the entire amount in Account 100.5 has been disposed of;”

All other accounting entries prescribed by said Order of November 24, 1942, were adopted and recorded by Pacific in its accounts, either prior to the entry of said Order, or as of the closing of Pacific's books for the month of December, 1942.

IX.

Pacific and American, each being aggrieved by said Order of November 24, 1942, filed with the Commission on December 31, 1942, pursuant to the provisions of Section 313(a) of the Act, their separate applications for rehearing as to the requirements of said Paragraphs (A), (B), and (H) of said Order, and of said Paragraph (O) in relation to said Paragraphs (A), (B), and (H). The Commission, by order entered in said proceeding on January 13, 1943, but not served until January 17, 1943, denied said applications for rehearing. By a prior order entered in said proceeding on December 31, 1942, upon application of Pacific filed on December 26, 1942, the Commission ordered that

“The time within which Pacific Power & Light Company shall file certified copies of the entries required by Paragraphs (A), (B), and (H) of the Commission's order of November 24, 1942, be and it hereby is extended to March 15, 1943.”

X.

The business, operations, and property of Pacific involved in said proceeding are located wholly within the states of Washington and Oregon, and Pacific's office and principal place of business for the conduct of said business is located in the City of Portland, State of Oregon, and within the Ninth Judicial Circuit.

XI.

Petitioners respectfully aver that said Paragraphs (A), (B), and (H) of said Order of the Commission, dated November 24, 1942 (hereinafter sometimes referred to as the "Order"), and said Paragraph (O) of said Order in so far as it applies to said Paragraphs (A), (B), and (H), are unreasonable, arbitrary, and contrary to law or without authority in law, and that the Commission erred in so ordering, as more fully hereinafter appears, namely:

(1) The Commission erred, as to said Paragraph (A), in not classifying in Account 100.5 Electric Plant Acquisition Adjustments, the amount of \$4,121,981.41 referred to in said Paragraph (A), since Pacific paid or incurred said amount of acquisition cost by the issuance of its securities for properties and rights adjudged by Pacific to have a value equivalent to the amount of such securities so issued, and at a time when the exercise of such judgment was, and thereafter became, controlling as to the cost of the property so acquired and as to the validity of the securities issued in exchange therefor, as fully-paid and non-assessable securities; and, by definition of Account 100.5, such

acquisition cost so incurred is required to be classified in said Account 100.5.

(2) The Commission erred, as to said Paragraph (A), in so ordering the reclassification of said \$4,121,981.41 in Account 107, instead of in Account 100.5 with other Electric Plant Acquisition Adjustments, by ignoring and by failing to take into account the great potential values in excess of cost to American, which were inherent in the properties and enterprises turned over by American to Pacific in 1910, as envisaged by the organizers of Pacific at that time, and the existence of which values has been fully demonstrated by the record of Pacific's growth and of its performance in the interests of consumers and the public from 1910 to date.

(3) The Commission erred, as to said Paragraph (A), in failing to recognize that American was under no obligation in 1910, when all of said \$4,121,981.41 of acquisition cost was incurred, to part with or to transfer the properties and rights involved in its transactions with Pacific for a consideration aggregating less than American's appraisal of the fair value of such properties and rights, irrespective of their actual cost to American, but was under a positive obligation to obtain the full value thereof in accordance with such appraisal, since the transfer contemplated that persons other than security holders of American would acquire an interest in Pacific; and the Commission's characterization of such acquisition cost as a "write-up" affords no lawful basis for differen-

tiating such cost from other acquisition costs which are required by the Commission's Uniform System of Accounts to be classified in Account 100.5, Electric Plant Acquisition Adjustments.

(4) The Commission erred, as to said Paragraph (A), while purporting to base its ordered reclassification in Account 107 of said \$4,121,981.41 of acquisition cost on the costs incurred by American, in disregarding and in failing to recognize the approximately \$4,000,000 of costs incurred by American upon the proposed Priest Rapids power development in furtherance and for the benefit of the properties and the enterprise transferred by it to Pacific in 1910.

(5) The Commission erred, as to said Paragraph (B), in ordering Pacific to "dispose of" said amount of \$4,121,981.41 of acquisition cost, whether reclassified in Account 100.5 as Petitioners maintain should be done, or in Account 107 as ordered by the Commission, for the reason that the Commission has no authority under the Act, or under the Constitution of the United States, to require the elimination from the asset side of the balance sheet of a public utility of any sum fully supported by the present fair value of its assets, although in excess of the Commission's determination of "original" or other cost.

(6) The Commission erred, as to said Paragraph (B), in assuming that its authority under the Act extends retroactively to the elimination from the accounts of a public utility of asset items lawfully established in the accounts of such public

utility long prior to the time when the Commission was granted any authority with respect to the accounts of such utility.

(7) The Commission erred, as to said Paragraph (B), in ignoring, and in refusing to permit the introduction of, competent, relevant, and properly proffered evidence on the issue of disposition, which fully establishes that the fair value of Pacific's assets is equal to or in excess of the recorded book value thereof.

(8) The Commission erred, as to said Paragraph (B), and violated the vested property and constitutional rights of Pacific and its stockholders, preferred and common, by directing in effect the elimination in whole or in part of Pacific's Earned Surplus created from lawfully earned income, the effect of which elimination would be to prevent the declaration or payment of dividends lawfully earned upon the capital stock of Pacific, and without regard or consideration for the value of Pacific's assets at the time of such elimination.

(9) The Commission erred in suggesting and implying by said Paragraph (B) that Pacific has a practicable means of creating a Capital Surplus against which all or any part of said \$4,121,981.41 may be charged, and that Pacific may thereby avoid the unconstitutional, confiscatory and destructive effect upon Pacific and its stockholders of the charge to Earned Surplus ordered by the Commission by its said Paragraph (B).

(10) The Commission erred, as to said Paragraph (H), for the reasons hereinabove set forth

under paragraphs (5), (6), (7), and (8) of this Article XI.

(11) The Commission erred, as to said Paragraph (H), because the \$2,741,591.66 of the amount in Pacific's Account 100.5, ordered by the Commission to be disposed of by amortization in ten equal annual charges to or deductions from income, represents admitted actual cost of and investment in Pacific's present assets, whether or not such assets be characterized as "intangible" assets; and as such, said \$2,741,591.66 of admitted actual cost and investment may not lawfully be required to be "written off" or disposed of, so long as the assets purchased at such cost remain the property of Pacific.

(12) The Commission erred, as to said Paragraph (H), because to require such amortization of said \$2,741,591.66 of admitted actual cost and investment in Pacific's assets, would unlawfully and unconstitutionally deprive Pacific of the right to declare and pay, and its stockholders, preferred and common, of the right to receive, dividends lawfully earned upon Pacific's preferred and common stocks, to the extent that such amortization at the rate of \$274,159.17 per year for ten years, beginning with the year 1942, will necessarily divert such lawful earnings to such other arbitrarily and unlawfully prescribed purpose.

(13) The Commission erred, as to said Paragraphs (A), (B), and (H), because the Commission, in issuing such orders, has exceeded the scope of its regulatory authority over Pacific under the

Act, has contravened the Fifth and Tenth Amendments of the Constitution, and Sections 1 and 2 of Article III of the Constitution, and has infringed upon the regulatory authority reserved to the States by said Act and the Tenth Amendment to the Constitution.

(14) The Commission erred, as to said Paragraphs (A), (B), and (H), by requiring Pacific to record its assets on its books at less than their present fair value, and because, to the extent that the Commission makes use of such revised books of account as a basis for regulating rates and dividends and for purposes of condemnation, it will exceed, and it threatens to exceed, the powers granted to it under the Act, and will violate the Fifth and Tenth Amendments to the Constitution, and Sections 1 and 2 of Article III of the Constitution.

(15) The Commission erred, as to said Paragraphs (A), (B), and (H), in failing to find (a) that the costs of the various businesses, properties and values inherent in the acquisition transactions between Pacific and American aggregate the amounts recorded on account thereof on the books of Pacific; (b) in failing to find that the amounts so recorded are fully covered and represented by assets having a value in excess of such amounts; and (c) in failing to find that the entire difference between so-called original cost and the cost recorded on the books of Pacific should be placed in Account 100.5; and the Commission further erred in ordering the classification of a portion of such

difference in Account 107, as required by Paragraph (A) of said Order, and in ordering the disposition of any part of said difference, as required by Paragraphs (B) and (H) of said Order, because such failures to find and such orders are arbitrary and capricious, violate the Fifth and Tenth Amendments to the Constitution, constitute the taking of property for a public purpose without payment of just compensation, are contrary to the provisions of Sections 1 and 2 of Article III of the Constitution, and violate the constitutional guarantees of due process and of the judicial determination of fundamental questions of fact and law.

XII.

As set forth in Article IX hereof, the Commission by order entered December 31, 1942, has extended the time within which Pacific shall be required to make, and to file certified copies of, the entries required by said Paragraphs (A), (B), and (H) to March 15, 1943; and Petitioners respectfully submit that Pacific should not be required, during the pendency of the appeal effected by this petition for review, to make the accounting adjustments required by said Paragraphs (A), (B), and (H) of said Order or to file copies of the journal entries provided for in said Paragraphs, or otherwise to disturb the status quo of Pacific's accounts. In this connection, Petitioners submit that if Pacific should be compelled to comply with said requirements of the Commission's said Order pending the outcome of this review, the questions raised in this petition

for review may become moot, thus denying Petitioners the right of judicial review provided for in Section 313 of the Act. Furthermore, such adjustments or journal entries may not be considered to be definitive for any purpose, nor may any determination or order of the Commission be based thereon, prior to this Court's determination of the issues herein, without denying to Petitioners the right of judicial review provided for in said Section 313 of the Act. On the other hand, if Pacific should fail or refuse to comply with said provisions of the Commission's said Order, both Pacific and its officers may become subject to the fines, penalties and forfeitures prescribed by Sections 315 and 316 of the Act.

Neither the public interest nor the interests of investors or consumers could conceivably be adversely affected by a stay of the Commission's requirements in this respect, because, if said Paragraphs of the Commission's said Order should be sustained by this Court, Pacific can and will be required to make, nunc pro tunc, said accounting adjustments and journal entries, and to file certified copies of said journal entries, as the Commission has required. If such accounting adjustments and journal entries could be made on March 15, 1943, as of December 31, 1942, they obviously may be made with equal propriety, if required to be made at all, after the determination of the issues raised in this petition for review.

Wherefore, Petitioners pray that said Paragraphs (A), (B), and (H) of said Order of the Federal Power Commission, dated November 24, 1942, and

said Commission's denial of Petitioners' said applications for rehearing filed on December 31, 1942, be reviewed by this Honorable Court; that this Court grant forthwith a stay of said Paragraphs (A), (B), and (H) of the Commission's said Order, and of Paragraph (O) of said Order in so far as the latter applies to said Paragraphs (A), (B), and (H), pending the entry of the judgment or decree of this Court upon the issues presented by this petition for review; and, in the event that the provisions of said Paragraphs (A), (B), and (H) shall not have been wholly set aside by such judgment or decree, until ten (10) days after the issuance and service upon Petitioner, Pacific Power & Light Company, of certified copy of such judgment or decree; and that, after consideration of the issues presented by this petition for review, this Court enter its judgment or decree wholly setting aside or annulling said Paragraphs (A), (B), and (H) of said Order, and granting to Petitioners and each of them such other

and further relief as may be just and proper in the premises.

Respectfully submitted,

PACIFIC POWER & LIGHT
COMPANY,

By WILL T. NEILL

Vice-President

AMERICAN POWER & LIGHT
COMPANY,

By L. H. PARKHURST

Vice-President.

JOHN A. LAING,

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Portland, Oregon,

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Attorneys for Petitioner,
American Power & Light
Company.

LAING GRAY & SMITH,

Portland, Oregon;

REID & PRIEST,

WHITE & CASE,

New York, New York,

Of Counsel.

State of Oregon,
County of Multnomah—ss.

I, Will T. Neill, being first duly sworn, depose and say that I am the Vice-President of Pacific Power & Light Company, one of the petitioners herein; that I have read the foregoing Petition and know the contents thereof, and that the same is true to the best of my knowledge and belief.

WILL T. NEILL

Subscribed and sworn to before me this 8th day of March, 1943.

[Seal]

JEAN M. GILCHRIST,

Notary Public for Oregon

My Commission Expires August 2, 1944.

State of New York,
County of New York—ss.

I, L. H. Parkhurst, being first duly sworn, depose and say that I am the Vice-President of American Power & Light Company, one of the Petitioners herein; that I have read the foregoing Petition and know the contents thereof, and that the same is true to the best of my knowledge and belief.

L. H. PARKHURST

[Seal]

JEAN M. GILCHRIST,

Subscribed and sworn to before me this 5th day of March, 1943.

[Seal]

ALICE M. POWELL,

Notary Public, Queens

County

Queens Co. Clk's No. 4173

Certificates filed in

N. Y. Co. Clk's No. 731, Reg. No. 3P441

Westchester County Clerk

Commission expires March 30, 1943

[Endorsed]: Filed Mar. 11, 1943. Paul P. O'Brien, Clerk.

At a stated term, to wit: The October Term 1942, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday the eighteenth day of March in the year of our Lord one thousand nine hundred and forty-three.

Present:

Honorable Francis A. Garrecht, Circuit Judge,
Presiding,

Honorable Bert Emory Haney, Circuit Judge,
Honorable William Healy, Circuit Judge.

[Title of Cause.]

ORDER STAYING PROCEEDINGS PENDING
DETERMINATION OF REVIEW

Upon motion of John A. Laing and Henry S. Gray, attorneys for Petitioner Pacific Power & Light Company, and of A. J. G. Priest and Adrian L. Foley, attorneys for Petitioner American Power & Light Company, and upon the Stipulation of said

attorneys for Petitioners and of Charles V. Shannon, General Counsel for the Respondent, it appearing to the Court that no prejudice can result to any party or to the public interest from granting of such motion as herein provided and good cause therefor appearing to the Court,

It Is Hereby Ordered that the requirements of Paragraphs (A), (B), and (H), and of Paragraph (O) as applied to Paragraphs (A), (B), and (H), of the Order of the Federal Power Commission, dated November 24, 1942, in that certain proceeding before said Commission entitled "In the Matter of Pacific Power & Light Company, Docket No. IT-5611", being the Order of said Commission for the review of which a Petition was filed in this Court on March 11, 1943, by said Pacific Power & Light Company and said American Power & Light Company,

Be and said parts of said Order hereby are stayed during the pendency of the cause commenced by the filing of said Petition for Review in this Court, and, in the event that said Paragraphs (A), (B), and (H) of said Order shall not have been wholly set aside by the judgment or decree of the Court upon such review, until 10 days after the issuance and service upon Pacific Power & Light Company of certified copy of such judgment or decree;

Provided, however, that, during the period of the stay granted hereby, said Pacific Power & Light Company shall not declare or pay any dividends upon any shares of its common stock, or make any other distribution upon any shares of its common

stock, except such dividends or distributions as might lawfully be declared, paid or made after complying with the provisions of Paragraphs (B) and (H) of said Order of Said Commission, dated November 24, 1942.

[Title of Commission and Cause.]

TESTIMONY

Trial Examiner: I believe, under the circumstances that the Examiner has no alternative but to deny the motion filed by respondent to dismiss this proceeding. I am sure the Commission has in mind a desire to get the facts concerning this particular proceeding, and if there is merit in the motion of respondent it, of course, can be passed upon later by the Commission. However, the Examiner presently will deny the motion and ask respondents to proceed. Now, before respondent does proceed, I think the order of the Commission clearly sets forth the principal questions that arise in this proceeding. However, there are, of course, many facts, and perhaps some questions of law underlying those principal questions, which have a direct bearing on the decision of the questions, and the Examiner, therefore, is desirous of having counsel state their positions and contentions at this time, and I think perhaps at this time it might expedite the hearing if that were to be done at the [249*] outset.

Mr. Foley: If the Examiner please, the Amer-

ican Power & Light do desire to join in the motion made by Pacific Power & Light and, unfortunately, you ruled against the motion before we had the opportunity to make our motion to join in that motion, and on added grounds. Now, we have prepared a form of motion to dismiss on behalf of the American Power & Light, which we would like to have inserted in the record, as if it had been introduced before you denied the motion of Mr. Laing.

Trial Examiner: I take it we can act upon your motion separately?

Mr. Foley: You might do that, except I have framed it joining in with its motion, and perhaps the way to state it would be, the American Power & Light adopt the motion to dismiss made on behalf of Pacific Power & Light, and for all the reasons therein stated, and on the additional ground—I think I will have to read this.

Trial Examiner: Very well.

Mr. Foley: “on the additional ground that, as a stockholder and creditor of Pacific Power & Light Company, the Intervenor’s property and property rights vested prior to the passage of the Federal Power Act, and all its other property and property rights, represented by such securities and debts, will be unlawfully prejudiced, jeopardized, and taken over for a public use without payment of just compensation and without [250] a judicial determination, by any order of this Commission requiring Pacific Power & Light Company to reclassify its accounts as proposed in the Commission’s orders dated respectively April 16, 1940 and

July 1, 1941, and in the joint report of the staffs of The Federal Power Commission and the Public Utilities Commissioner of Oregon, or by requiring Pacific Power & Light Company to dispose of any amounts recorded on its general corporate or other fundamental accounts and records fully covered or supported by present fair values, in violation of the jurisdiction and power granted to the Commission by the Federal Power Act, and in violation of the provisions of Articles V and X of the Amendments to the Constitution of the United States and in violation of the constitutional guarantees of due process of law, judicial procedure and determination of such questions and of freedom from arbitrary, unreasonable, or capricious actions or determinations by the government or any of its branches or departments or any of its agencies.”

Trial Examiner: Very well. I think, perhaps, the position that the Examiner has taken with regard to the motion filed by respondents would govern the disposition of your motion, Mr. Foley, and the reasons assigned are also the reasons for denying the motion that has just been filed by [251] the intervener, the American Power & Light Company. The motion will be denied.

Mr. Laing: Mr. Examiner, I assume that the ruling made against the Pacific Power & Light Company, and the intervener, as a matter of course, automatically carries an exception with it.

Trial Examiner: That is right. It may be understood that any ruling of the Examiner ad-

verse to counsel, that an exception is automatically granted. [252]

Trial Examiner: Do you have anything further, Mr. Slaff, at this time?

Mr. Slaff: I don't think there is much that need be added, Mr. Examiner. I have just received this answer, and I have flipped through it while Mr. Laing was making his comments with respect to it, and I think, perhaps, making due allowance for the usual self-serving statement contained in it, it probably reasonably fairly sets forth what is now at issue in this hearing, as I understand it by the filing of the revised reclassification, which is going to be put in evidence and going to be explained by a witness of the Company. The issue has pretty well narrowed down to a determination as to what accounts properly belong in 100.5 and what amount properly belongs in Account 107, and what disposition is to be made of the amounts which are ultimately properly established in those accounts. There may be some periphery, some minor issues involved; but, as I understand it, that is what the ultimate problem is that will be involved in this proceeding. [256]

Mr. Laing: I should like to add to what Mr. Slaff said, and I am glad that he made the comment; and that is that I agree with him that the issues in so far as they have to do with matters involved in the Examiner's report have been very definitely crystalized and simplified as to the present state of the record or, rather, as the record will appear when the revised statements are offered in

evidence; and I want to say in all earnestness and good faith that for the past two or three weeks, it has been our very definite aim to establish that result and to file with the Commission and make available to the Examiners of the two staffs, a report that would crystalize the problem and indicate the points of acceptance and differences as clearly and sharply as could be done, so as to save a great deal of fooling around or wasting time trying to get down to grips with the problem; that has been our objective in the work that we have done in preparation for this hearing. [257]

WILL T. NEILL

called as a witness on behalf of the Pacific Power & Light Company, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Laing:

Q. You are the Vice-President of the Pacific Power & Light Company? A. I am.

Q. And you testified at the earlier hearing of this proceeding in Washington, D. C., May 23, 1940? A. I did.

Q. At that time you stated your qualifications, experience, and training, and your connection with the Pacific Power & Light Company in this particular work, did you not? A. I did. [259]

Q. Now, if you will refer to the order of July 1, 1941. Have you got it before you?

(Testimony of Will T. Neill.)

A. Yes.

Q. That order contains a recital, as subparagraph (c), [260] to the following effect: The Company, since adjournment of the hearing referred to in paragraph (b) hereof, filed on July 3, 1940, its proposed reclassification and original cost studies required by Electric Plant Instruction 2-D of the Commission's Uniform System of Accounts and the Commission's order of May 11, 1937. Are you familiar with the material that was filed by the Company as set forth in that paragraph of the Commission's order? A. Yes, I am.

Q. When was that material forwarded?

A. That material was forwarded to the Federal Power Commission on July 1, 1940. [261]

Q. Mr. Neill, I now hand you a printed volume, which is entitled, "Pacific Power & Light Company Reclassification of Electric Plant, Statements A to I, inclusive." I will ask you if that is the volume that was referred to in the letter of July 1, 1940, the receipt of which is referred to in the Commission's order of July 1, 1941?

A. That is correct. I see some pencil marks in this, [263] however.

Q. You say that is the volume?

A. That is the volume.

Mr. Laing: I would like to offer it for identification as an exhibit.

Trial Examiner: It will be marked for identification as Exhibit 15.

(Testimony of Will T. Neill.)

(The document referred to was marked Exhibit No. 15 for identification.)

Mr. Goldberg: I think it would probably be desirable at this time to offer for identification the staff report, "Pacific Power & Light Company, Portland, Oregon, Report on the Reclassification and Original Cost Studies of Electric Plant as of January 1, 1937," as Exhibit 16 for identification.

Trial Examiner: It will be so marked.

(The document referred to was marked Exhibit No. 16 for identification.)

Mr. Laing: That is the document referred to in the Commission's order of July 1, 1941, in subdivision (d) of the recital?

Mr. Goldberg: Yes.

By Mr. Laing:

Q. Mr. Neill, can you advise us whether copies of this report, which has been marked as Exhibit 15 for identification, were sent out, at or about the same time, for [264] filing with the Public Utilities Commissioner of Oregon and with the Washington Department of Public Service?

A. Yes. We sent copies of the report to the Public Utilities Commissioner of Oregon on the 2nd day of July, 1940; and to the Department of Public Service of Washington on the 16th day of July, 1940.

Q. And they were sent to those two regulatory authorities, respectively, because of the fact that the Pacific Power & Light Company operates, as a

(Testimony of Will T. Neill.)

public utility, in each of those states and is subject to the jurisdiction of those respective regulatory bodies; is that correct?

A. That is correct.

Q. And with respect to the Oregon Public Utilities Commissioner, at least, there was pending at that time a more or less parallel proceeding to determine pretty much the same reclassification problems that were involved in the proceeding before the Federal Power Commission?

A. That is correct.

Q. And is that true to the same or a lesser extent with respect to the Department of Public Service of Washington?

A. That is true to substantially the same extent, the only difference being in the State of Washington the utility had one extra year in which to prepare its classification statement. [265]

Q. Now, will you take up Exhibit 15, and tell us, in general terms, what information and data the company submitted in response to this order of May 11, 1937.

A. This Exhibit No. 15, which was the volume of state- [266] ments A to I, inclusive, which the company submitted, contains those statements, as follows: Statement A in this volume is a rather complete narrative of the history of the origin and development of the company and its predecessors.

Q. That comprises the first 115 or 120 pages of the bound volume, does it not? That is, Statement A?

(Testimony of Will T. Neill.)

A. That is correct. The first 115 pages. Statement A is divided up into several chapters. Chapter I, which begins on page 3, and runs through page 23, is a general outline of the development of the Company; that is, the origin and the development of the Company. This chapter includes a description of the territory served. On page 4, or 5, there is a chart showing the communities supplied with electric service on January 1, 1937, of which there are approximately 150 on the chart. The chart shows, in pink color, the communities in which there were distribution systems originally acquired by the Pacific Company; the communities colored in blue indicate the communities in which the Pacific Company was the first agency to furnish electric service. One interesting thing about this chart is that the original acquisition which the Pacific Power & Light Company made in 1910 included property serving seventeen of the approximately 150 communities which it was serving at the end of 1936.

Following this chart of communities served, on page 6 is a map showing the general character of the territory served [267] by the Pacific Power & Light Company which, I think, will be interesting to those who are familiar with this territory. This is a relief map of the Columbia River area, and on this there have been superimposed, with red dots and stars, the principal communities which were served by the company's properties at the end of 1936. Rather, a better story of the nature of the

(Testimony of Will T. Neill.)

Company's territory and the areas which it serves and the manner in which they are served can be gotten from the maps; that is, in conjunction with the map on page 6, by considering the maps on pages 7 and 8.

The map on page 7 is a service area map showing, with general boundaries, the territories in which the Company actually has electric service lines. I might say that this chart has a lot of vacancies in between the service areas, but to one who knows the country, those spaces which are not now served by the Company, that is, within the general boundaries of its system, are spaces which are uncultivated lands, timber lands, or wide expanses of wheat lands, where the population is very scattered.

Q. They probably are what are commonly referred to in the West as the "wide open spaces"?

A. Yes, those are the wide open spaces. The service areas generally are confined, naturally, to the valley areas, the river bottom lands, and to the services within the boundaries of irrigated projects, that being where the population [268] is concentrated, most of it, in this territory. I might say, in connection with this map, while we are on it, the Company's system,—I think I had better make that explanation in connection with map 8,—that is, the map on page 8, rather.

On page 8 is a map which shows the general layout of the Company's transmission lines as of December, 1936. This map will show that the Com-

(Testimony of Will T. Neill.)

pany has four different power systems; three of these systems are of no great magnitude compared with the fourth, which is shown in the upper central part of the map, and which, in Company parlance, is referred to as the main power system. It shows that all the communities served, with the exception of those in those three isolated systems, are completely interconnected with the transmission lines, with interconnections between power plants and with sources of power from interconnections with other companies.

Q. While you are looking at that map, and enlarging somewhat on your explanation, the three systems that you refer to as isolated or independent systems of small magnitude, smaller magnitude than the main system, are located and referred to how, in the Company's records and correspondence?

A. Well, if you will note, at the mouth of the Columbia River, on the left-hand side of the map, there is a small system centering near the town of Astoria. That is ordinarily referred to as either the Clatsop County System or the Astoria-Seaside System. That is served by one steam plant, and now [269] has an additional supply, since this report was made, through interconnection with lines connecting with the Bonneville Power Administration.

Q. And it also has a connection for standby service received from one or more lumber companies?

(Testimony of Will T. Neill.)

A. Yes; in addition to our steam plant and the connection with the Government line, we have a firm connection with the Prouty Lumber Company.

Q. The general character of business and industry in the Clatsop County section is made up of what?

A. The territory in the Clatsop County area is made up principally of lumbering and fishing. Astoria is the center of the salmon fishing and canning industry on the Columbia River, and the entire area is very actively engaged in the lumbering business. This area, also, is a summer resort area, as the territory south of the town of Warrenton, shown on the map, down as far as Cannon Beach, is along the seashore, and it is a highly developed summer resort area.

Q. And it is somewhat of a winter resort area, also?

A. It is becoming more and more a winter resort, also.

Speaking of the four systems, I neglected to say, and if you will notice on this map, just east of the Astoria system there is another system of Pacific Power & Light property. This is a system of distribution properties which is owned by the Pacific Company, but leased for operation to the North-[270] western Electric Company.

Q. That territory embraces what counties? Generally speaking, the territory you just mentioned embraces Clark and Cowlitz counties in Washington and a part of Columbia County in Oregon?

(Testimony of Will T. Neill.)

A. A part of it is in Columbia County, Oregon; the majority of the properties in Washington are in Cowlitz and Clark counties,—principally, Clark County. There is also a small part of the system in Skamania County.

Q. Referring to your smaller systems, will you tell us where they are located, generally?

A. The so-called Deschutes system is a system shown in the lower central part of the map; that is central Oregon. It is entirely isolated; that is, it has no interconnection with any of the other systems on account of its distance away from the other power systems and the absence of population in the intervening areas. This system is supplied with power by the Company's hydroelectric plants at Bend and at Cline Falls; and also leases from the Inland Power & Light Company and operates a hydroelectric plant on the Crooked River; and also purchases power from two large lumber mills in Bend. That territory is largely devoted to the lumbering industry, augmented by some agricultural activity.

The other isolated system will be seen in the right-hand section of the map, about the center; that system is known as [271] our Enterprise system; that is a relatively small, isolated system in the Wallowa Valley, an isolated valley, surrounded by rugged mountain territory. The territory is devoted to stock raising, grain, some lumbering, and, also, if I can put in another plug for Oregon, it is the territory known as the "Alps of Oregon" or

(Testimony of Will T. Neill.)

"Alps of America." It is a very rugged territory, with very high mountains.

Q. The main power system, then, Mr. Neill, generally speaking, may be said to embrace the Yakima Valley and the Columbia River Valley, and the lower part of the Snake River Valley, as shown on the map; is that correct?

A. A part of the Snake; a little of the Snake. I think you might designate it as the Walla Walla River Valley rather than the Snake; I think that would be a better designation, although the service area is along certain tributaries of the Snake. The whole territory on the main power system from Yakima east to Pataha is devoted largely to agricultural and horticultural industry.

The eastern end of the system is almost entirely wheat raising. I wouldn't say almost entirely; the majority of the activity on the eastern end of the system is wheat raising.

The western section of the main power system in Washington is in the Yakima Valley, which is an irrigated valley, and is largely devoted to general agricultural and fruit raising industries. [272]

I might say, on the whole Pacific system, there is no great development of industries, except those which are connected with either lumbering, horticultural or agricultural pursuits. We have a few fairly large flour mills, a few fairly large lumber mills on our system, a good many canneries, a few fruit processing plants, fruit refrigerating plants, and industries of that kind.

(Testimony of Will T. Neill.)

Q. Is this system so located and so interconnected by its transmission lines to be in a position to utilize the power that may be generated at the Federal hydroelectric projects at Bonneville and Grand Coulee?

A. Yes; it is right in between them. [273]

Q. And by means of transmission line connections that the Company has in Washington extending up to Lind, Taunton, and Beverly, the Company is in position to, through other interconnections, be connected to the Grand Coulee source of supply, is it not?

A. That is correct. We are connected at Portland and Lind and also at Pataha, with the lines of the Washington Water Power Company, which cover the area of our main power system. The Washington Water Power Company furnished power for the construction of the Grand Coulee development, has high tension transmission lines in that neighborhood. I might say, while we are on this map, that the Pacific Company system is also interconnected down the Columbia River near Hood River, near the town of Underwood, as a matter of fact, with the high tension transmission system of the Northwestern Electric Company which, in turn, is interconnected with the Portland General Electric Company.

Q. Of course you have not undertaken to go through [274] this statement A in detail. You have at page 15 a map that shows the interconnection

(Testimony of Will T. Neill.)

with the main power systems in the Pacific Northwest, have you?

A. That is correct; that shows the interconnections which existed, I believe, December 31, 1936, at or about that date, and the Pacific Company systems on that map are shown in red.

Q. It appears from that map that the Pacific main power system is fitted right in between the main power sources around Portland and those around Spokane and interconnected also with the power supply systems in the Puget Sound area; is that correct?

A. Yes. That is completely interconnected with the privately owned systems which are on its borders.

Q. In the main, those privately owned systems have interconnections also with the publicly owned systems, have they not?

A. Yes.

Q. Now, without taking up any more time with these maps, I would like for you to refer for a moment to—not in detail, but just indicate what has been shown, or attempted to be shown on the map on page 23 of that statement A.

A. Page 23 contains a corporate development diagram of the Pacific Power & Light Company. This is a diagram showing the corporate development of all of the properties [275] which have come into the Pacific Power & Light Company through acquisition.

Q. In other words, this indicates the names of the various individuals, partnerships, or corpora-

(Testimony of Will T. Neill.)

tions through whose ownership, or possession, the properties now operated by the Pacific Power & Light Company have gone from the beginning of time up until now? A. That is correct.

Q. Or up to December 31, 1936?

A. Yes, sir; up to as far as December 31, 1936. I might say this, in passing, that the oldest of the systems that are represented by these corporate developments are an electric system which was originally started in Astoria in Clatsop County, Oregon, in 1885. The rest spread along there—that is, the first beginnings of the electric service in the various parts of territory served by the Company.

Q. Now, referring generally, then, to this statement A, the first 115 pages of this Exhibit 15 here in this written story, other than as shown by the map and drawings and diagrams, traces the development of the Pacific Power & Light Company from its incorporation down to December 31, 1936?

A. That is correct.

Q. And the Company was incorporated when and under what circumstances?

A. It was incorporated under the laws of the State of [276] Maine on June 16, 1910.

Q. And qualified shortly thereafter, I assume, to transact business as a foreign corporation in Oregon and Washington, was it not?

A. I believe so, although I don't know the dates when it was done.

Q. Now, can you tell us what the purpose was in these various chapter headings on this? With-

(Testimony of Will T. Neill.)

out attempting to go into any detail about it, what was the purpose of the various chapters listed in statement A?

A. As I said, chapter 1 covers the general origin and development of the Company. Chapter 2 and and following chapters take up various major acquisitions. Chapter 2, starting on page 24, is also indicated in the index, covers the development of the Astoria Electric Company system, which was a part of the first acquisition made by the Company in 1910. Chapter number 3—let's go back to chapter number 2. That gives information, generally, of the same character as contained in chapter number 1, except it related only to the Astoria area,—Clatsop County area. Chapter number 3 gives similar information with respect to the acquisition of the Columbia Power & Light Company properties, which were also a part of a major acquisition by the Pacific Power & Light Company in 1910. That chapter also gives about the same information for those particular properties as is contained [277] generally for the entire company in chapter number 1. Chapter number 4 gives the same sort of information—charts, and maps for the properties of the Yakima-Pasco Power Company, which was identified as a major acquisition by the Pacific Power & Light Company in 1910.

Q. In other words, I understand with respect to these other companies, like Astoria Electric, Columbia Power & Light Company, Yakima-Pasco, what you did was to really go back to 1910 and dig

(Testimony of Will T. Neill.)

out the ancient history of the communities and their electric service and their properties up to the time they got to Pacific in 1910?

A. That is right. In addition, in all of these chapters in statement A, we have also put in various charts concerning the growth of our business, changes in our rates to show what happened within the Company's territory, since the acquisitions were made by the Pacific Company.

The first four chapters—that is, chapters 1, 2, 3 and 4, as I have said, cover a portion of the major acquisitions in 1910. Chapter 5 covers smaller acquisitions made from 1910 to 1929. Various types of property and the number of transactions which were made during that period are also shown. Chapter 6 takes the acquisition from 1930 on up to 1936.

Q. That is the beginning, I suppose, with the first of 1930; is that not correct? [278]

A. That is correct; and that period included one of the major acquisitions made by the Company, and in chapter 6 the same detailed sort of information is given for the territory covered by the properties included in that acquisition prior to the time the properties were acquired by the Pacific; also such information as was available as to the developments within that territory after Pacific acquired the property.

Q. Will you refer briefly to the other statements contained in that original volume? Tell us what they undertook to present.

(Testimony of Will T. Neill.)

A. Starting on page 116, going on through 119 is statement B which, in accordance with the Commission's order of May 11, 1937, was to contain a statement of acquisitions—electric operating units or statements by acquisitions showing the original cost thereof, the acquisition of adjustments in [279] connection therewith.

Starting on page 120 and ending on page 121, statement C, in which we were required to show the amounts included in our Plant Account, which had been arrived at by appraisals recorded prior to January 1, 1937, in lieu of cost to the Company.

Q. As to that, you show that there were none; is that correct?

A. There had been none. Page 122, title page and statement D, which runs through page 127, which shows in detail the plant accounts as recorded on the books of the Company as of December 31, 1936. That is as classified immediately prior to the reclassification in accordance with the new system of accounts. That statement shows the various plant accounts for the Company's water and other systems, as they were recorded on the Company's books on December 31, 1936. On pages 128 and 129, is statement E, which is a statement on which the Commission's order of May 11, 1937, required that the Company show the summary of adjustments necessary to state as of January 1, 1937, the accounts as prescribed in the Federal Power Commission's Uniform System of Accounts.

Q. I take it that that statement E is a sum-

(Testimony of Will T. Neill.)

mary of data and adjustments that will be reflected in some of the other statements; is it not?

A. That is correct. On pages 130, through 135, [280] statement F, which is a detailed statement of Accounts 100, electric plant as of January 1, 1937, and Account 107, electric plant adjustments, classified in accordance with the Uniform System of Accounts effective January 1, 1937. [281]

Q. That, again, is based on the cost data and other information which are reflected in some of the other statements, is it not, Mr. Neill, or is that the basis——

A. That is the basic statement from which the amounts in some of the other statements are drawn. On pages 136 and 137, appears Statement G, which is a comparative general balance sheet, or a comparative balance sheet, as of January 1, 1937, page 137 showing the balance sheet before and after making the adjusting entries shown in the other statements.

On pages 138 and 139 appears Statement H which, in the Commission's order of May 11, 1937, required the Company to show a suggested plan for disposition of amounts as of January 1, 1937, includable in account 100.5, Electric Plant Acquisition Adjustment, and Account 107, Electric Plant Adjustments.

The Witness: On pages 140 through 151, appears Statement I which, according to the Commission's order of May 11, 1937, was provided for showing various statistical information with respect

(Testimony of Will T. Neill.)

[282] to individual production power plants, transmission lines, and substations, and other equipment.

Q. Now, am I correct in assuming, Mr. Neill, that the Statements B, E, F, G, and H, to the extent that they speak of adjustments, represent adjustments which are suggested, or were suggested at the time, by the Company, as a result of the reclassification studies it had made, but do not represent changes that were actually made in the Company's plant account, either then or later?

A. That is correct.

Q. In other words, they were the entries which the Company, on the basis of the information it had at the time felt might properly be made to conform with the requirements of the Commission's classification of accounts; is that correct?

A. That is correct.

Q. Referring back to the Commission's order of July 1, 1941, subdivision C of the recitals, where the Commission refers to the Company's having filed its original cost studies; which statement in this Exhibit 15 really sets forth the results in detail of the Company's studies as to original cost and as to the adjustments necessary on account of the original cost determinations?

A. That is Statement F.

Q. I would like to present you this volume (counsel [283] handing a book to the witness). The document which I have just handed to you, Mr. Neill, bears what sort of identification on the cover page?

(Testimony of Will T. Neill.)

A. This is a document bearing the identification on the cover page which reads as follows:

“Pacific Power & Light Company, Reclassification of Electric Plant, prepared pursuant to Uniform System of Accounts—Electric Plants Accounts Instruction 2-D and to Order of May 11, 1937, of Federal Power Commission. Revised Statement B, Revised Statement E, Revised Statement F, Revised Statement G, Revised Statement H, Revised Statement I, With Introductory and Explanatory Statements. Federal Power Commission—Docket No. IT-5611.” Dated at Portland, Oregon, September 26, 1941.

Mr. Laing: I should like to have that document marked for identification, Mr. Examiner.

Trial Examiner: It will be marked for identification as Exhibit No. 17.

(The document referred to was marked Exhibit No. 17 for identification.)

By Mr. Laing:

Q. I have also just presented to you, Mr. Neill, what purports to be a copy of a letter on the letterhead of Pacific Power & Light Company, addressed by you, as Vice-President, to the Federal Power Commission, dated September 27, 1941, and I will ask you what that document is. [284]

A. That is a letter of transmittal with which we transmitted to the Commission on September 27th, by Air Mail, originals of the document that has been identified as Exhibit 17.

(Testimony of Will T. Neill.)

I would like to offer that copy of letter for identification, Mr. Examiner.

Trial Examiner: It will be marked for identification as Exhibit 18.

(The document referred to was marked Exhibit No. 18 for identification.)

By Mr. Laing:

Q. I wish you would refer for a moment to Exhibit No. 18, Mr. Neill, and I would like to call your attention to the second and third paragraphs of the letter. Will you read that at this time? Start with the second paragraph. Perhaps you may have to go back further than that; I don't know. Perhaps you had better begin at the beginning.

A. This letter is dated September 27, 1941, addressed to the Federal Power Commission, Washington, D. C. "Re: Reclassification of Electric Plant Account, FPC Docket No. IT-5611.

Dear Sirs:

"On July 3, 1940, Pacific Power & Light Company filed with the Commission a volume entitled 'Reclassification of Electric Plant—Statements A to I, inclusive', which had been [285] prepared by the Company pursuant to Electric Plant Instruction 2-D of the Commission's Uniform System of Accounts, and to the Commission's order pertaining thereto adopted May 11, 1937. The Company's letter to the Commission of July 1, 1940, transmitting this volume, stated among other things that

(Testimony of Will T. Neill.)

it might be 'necessary to make amendments to or revisions in such statements.'

"Since that date, the Company has been continuously engaged in making further studies and analyses of the problems involved, and has considered criticisms and suggestions contained in the Joint Report of the examiners for the Commission and the Public Utilities Commissioner of Oregon, served on the Company on July 7, 1941, and has had various consultations with the Commission's staff relating to these problems. It has also received and considered the various provisions of the 'Order Resuming Hearing and to Show Further Cause' entered by the Commission on July 1, 1941, in Docket IT-5611.

"The results of these further studies, analyses and consideration have been compiled in Revised Statements B, E, F, G, H, and I, respectively, with an 'Introductory and Explanatory Statement' in the form of a letter addressed to the Commission dated September 26, 1941, all of which have been assembled in a single volume with identifying cover page, these statements being verified by the affidavit of the undersigned dated September 26, 1941. Three signed counterparts of this [286] volume are transmitted herewith for filing with the Commission.

"The material assembled in this volume has been made available to the members of the Commission's staff now at Portland in preparation for the hearing on September 29, from time to time as the

(Testimony of Will T. Neill.)

various statements were compiled. One complete copy of the volume was delivered to the Commission's staff at Portland yesterday, September 26, and additional copies are being delivered to the staff today."

By Mr Laing:

Q. I am going to offer the entire letter in evidence, not at this time; but at this time I would like to ask you whether the document which has been marked as Exhibit No. 17 for identification is the document, or the volume that is referred to in this letter. A. It is.

Q. And can you tell me whether the material referred to in this letter of September 27th was actually air mailed on that date to the Federal Power Commission. A. It was.

Q. And do you know, Mr. Neill, whether copies of this same Exhibit No. 17 for identification were also mailed on that date to the Public Utilities Commissioner of Oregon at Salem, and to the Department of Public Service of Washington, at Olympia? A. They were. [287]

Q. On the same date?

A. On the same date.

Q. Now, referring to this Exhibit No. 17 for identification, will you turn to the verification page at the close of that Exhibit, No. 17, and read that, please, into the record?

A. The text of the verification reads as follows:
"Will T. Neill, being first duly sworn, on oath states that he is Vice President of Pacific Power

(Testimony of Will T. Neill.)

& Light Company; that the foregoing statements entitled Revised Statement B, Revised Statement E, Revised Statement F, Revised Statement G, Revised Statement H, and Revised Statement I, and the foregoing Introductory and Explanatory Statement in the form of a letter addressed to the Federal Power Commission, dated September 26, 1941, have been prepared by him or under his direct and personal supervision; that said Revised Statements have been prepared and are being submitted for the purpose of amending, superseding, and taking the places of Statements B, E, F, G, H, and I, respectively, relating to the same subject matter, filed by said Company with the Federal Power Commission and with the Public Utilities Commissioner of Oregon, on July 3, 1940, and with the Department of Public Service of Washington on or about July 17, 1940; that he has examined each of said Revised Statements and said Introductory and Explanatory Statement and is familiar with the contents thereof; and that to the best of his knowledge and belief the information contained in said Revised Statements and in said Introductory and Explanatory Statement, is true and correct and, subject to the limitations of records and data available to said Company for the preparation of such Statements, has been prepared in accordance with the provisions of the Uniform System of Accounts prescribed by the Federal Power Commission for public utilities and licensees, and of the order relat-

ing thereto adopted by said Commission on May 11, 1937, and in response to certain of the suggestions contained or implicit in the order of the Federal Power Commission in Docket No. IT-5611, dated July 1, 1941, relating to the subject matter treated or referred to in said Statements."

By Mr. Laing:

Q. That verification was made by yourself? You are the Will T. Neill referred to therein, are you not?

A. I am.

Q. Now, Mr. Neill, I wish you would turn to the second page of that exhibit No. 17 for identification, and read what the statement therein contains as to the work that was done by you and your company after July 1, 1940, or give us your own statement, as you see fit, as to what was done by the Company after the filing of the original statements on the 3rd of July, 1940.

A. That is covered by this page, and I should like to read it, if I may. [289]

I am reading from page 2 of the Introductory Statement.

"Since the filing of said Statements A to I, inclusive, the Company has been actively engaged in further studies of the problems presented by said Instruction 2-D and by said Order of May 11, 1937, for the purpose of verifying, and of correcting or supplementing where necessary or appropriate, the results of the original cost and other studies presented in said Statements A to I, inclusive. It has also obtained for and supplied to the staffs of the Federal Power Commission

(Testimony of Will T. Neill.)

and the Public Utilities Commissioner of Oregon such additional data, compilations, analyses, and supplementary or explanatory statements relating, directly or indirectly, to said Statements A to I inclusive, as have been requested from time to time over said period by the members of said staffs.

“In this work the Company has cooperated to the fullest possible extent with the representatives of the Federal Power Commission and the Oregon Commissioner in their joint examination of the Statements so submitted; and the Company has indicated to the staffs from time to time the Company’s readiness and intention to make corrections or revisions of said Statements wherever it appeared or might thereafter appear to the Company that corrections or changes were necessary or desirable. As a result of these further studies and of such consultations, the Company has found it necessary or appropriate to revise Statements B, E, F, G, H, and I as originally filed, [290] and to submit in lieu thereof the Revised Statements B, E, F, G, H, and I, respectively, hereto attached. Each of these Revised Statements is prefaced by an explanation of the revisions made, with such other comments as appear appropriate to a clear understanding of the facts presented, the methods pursued, and the Company’s position with respect thereto.”

Q. Now, as I understand from that statement of yours, and from this statement in the verification, the Company, as a result of the work which was done following the filing of the original State-

(Testimony of Will T. Neill.)

ments A to I, inclusive, found it necessary to change, or supersede certain of those statements originally filed; isn't that correct?

A. That is correct.

Q. In this verification in this statement you have just made, you have made no reference to the original statements A, C, and D, and those statements now stand as Statements A, C, and D; do those statements A, C, and D, stand as originally filed?

A. The Statement C and D stand as originally filed, there being no necessity for any revision in those two statements. Statement A, however, stands as originally filed, except as to certain changes which should be made on the maps included therein.

Q. That is, these maps showing the status of the system [291] as of various dates?

A. That is right. Those maps appear on pages 8, 16, 64, 85, 90, and 114, of Statement A, as originally filed.

Trial Examiner: That is Exhibit 15 as marked for identification?

Mr. Laing: Exhibit 15.

By Mr. Laing:

Q. What is the occasion for the necessity of making any revisions in those maps indicating the system at those times?

A. The reason for making the changes in the maps is that these maps, as originally included,—or, included in original Statement A, were de-

(Testimony of Will T. Neill.)

signed primarily to show service areas of the Company, and for that purpose they were satisfactory; but during the examination of the statements by the Commission's staff, it was disclosed that on these maps, which show the various lines of the Company, all of the lines shown in heavy black on these maps are labeled as transmission lines.

Now, that is not a correct classification of transmission lines with respect to the accounting for such lines under the Uniform System of Accounts. Some of these lines which are shown on these maps are actually major distribution feeders. So we thought it well to revise the maps so they would be in accord with the classification of property used in the original cost studies. [292]

Q. And you propose to offer revised maps showing those corrections, do you? A. Yes.

Q. Subject, then, to those necessary revisions, between transmission and distribution on the map, this Statement A and Statements C and D of this report that was filed July 3, 1940, represents your Company's return as it stands at the present time, in response to those particular phases of the inquiry, does it not? A. That is correct.

Mr. Laing: I think at this time I would like to offer Exhibit 15 in evidence, subject to the revisions that were made by Mr. Neill's verification in submission of the report of September 27th; namely, that the Statements B, E, F, G, H, and I

(Testimony of Will T. Neill.)

of the original filing are being superseded by these Revised Statements.

Mr. Slaff: No objection.

Trial Examiner: Exhibit 15 will be received.

(Exhibit No. 15 Was Received in Evidence.)

[293]

Q. Now, referring again, Mr. Neill, to your Exhibit No. 17 for identification, you discussed therein the task of determining the original cost as the Company has found it in this investigation, and I wish you would explain in some detail just how that job was tackled, and what the Company has undertaken to do about it.

A. I think the best method of doing that, probably, to save time, is to read page 3, and a small section at the top of page 4 of the Introductory Statement in Exhibit 17, that detail being headed by a title, "Original Cost Statement."

"The work and basis of preparing the statement of original cost reflected in Revised Statements B, E, F, G, H, and I hereto attached, and, except as modified by said Revised Statements, in the original Statements filed on July 3, 1940, have previously been described in the Company's Answer of May 18, 1940, to the Commission's Show Cause Order of April 16, 1940, in Docket No. IT-5611, and in the testimony presented at the hearing on said order. As stated in paragraph (3) of said Answer:

'Following the receipt of the Commission's or-

(Testimony of Will T. Neill.)

ders for the reclassification of electric plant, the Company made a study of the Uniform System of Accounts effective January [294] 1, 1937, and thereafter of the requirements of the Commission's order of May 11, 1937, and then began examination of available records for the purpose of reclassifying its electric plant in accordance with said Uniform System of Accounts, following which the Company began the studies which it then believed and considered to be proper for the determination of the original cost of its electric plant on the basis of recorded cost, to the extent that cost records were available and the estimated cost of the remainder of its property.

'Such determination involved in part the use of an Estimated Cost of Construction study which had been made by the Company for a portion of its property in connection with a rate and valuation proceeding previously pending before the Department of Public Service of the State of Washington. Such Estimated Cost of Construction study was based in part on starting figures obtained from early appraisals, and the straight addition thereto of net additions as shown by Company's fixed capital accounts subsequent to the date of such appraisals.

'It was subsequently determined by the Company and by accounting representatives of the Commission and of the Public Utilities Commissioner of Oregon that extensive revisions and adjustments were necessary in all of the studies which the

(Testimony of Will T. Neill.)

Company had prepared, both as to starting figures [295] and as to subsequent additions and retirements.

‘For the purpose of meeting such objections, the Company deemed it necessary to undertake the reclassification of its property upon the basis of determinations which did not involve the use of such old appraisals. An inventory of the electric property was prepared as of December 31, 1936. The Company has determined the cost of property from its records to the extent that the cost of such property could be identified in its records, and the use of estimates is being confined to those property items for which the actual original costs are not determinable from books and records’.”

[296]

Q. Referring to the matter that you have just read, when that work was completed it was embodied in the Statements A to I, inclusive, which was filed with the Commission on July 3, 1940?

A. Yes.

Q. That is the exhibit which has now become Exhibit 15?

A. Yes.

Q. And thereafter did the Company receive a document from the Commission, having to do with the statements A to I, inclusive, included therein?

A. We received such a document on July 7, 1941; that document has now been marked for identification as Exhibit 16, which is a joint report made by the staff of the Power Commission and of the Public Utilities Commissioner of Ore-

(Testimony of Will T. Neill.)

gon on the reclassification statements previously submitted by the Company.

Q. That document is now Exhibit 16 for identification? A. Yes.

Q. And it refers to the result of careful analyses and studies, I assume, made by the joint staffs of the Commissions somewhere between July 3, 1940 and the 1st of July, 1941? Is that correct?

A. I think that is approximately correct.

Q. Will you refer to that joint report, Exhibit 16, or to your reference to it in Exhibit 17, and tell us what the [297] Joint Report has, generally, to say about the nature of the study that was made to determine the original costs?

A. It is easier for me to refer to that in the document designated as Exhibit 17. I will refer to page 4 of the introductory statement, in which I make the following statement:

“With respect to this determination of original cost, the Joint Report of the staffs of the Commission and of the Oregon Commissioner, dated June 21, 1941, and served upon the Company on July 7, 1941, comments in part as follows:

‘The basis of the company’s reclassification studies submitted to the Commissions was a priced inventory as of December 31, 1936. In the pricing of this inventory, the company relied to a great extent upon the costs developed in the ‘Estimated Cost of Construction’ schedules, with certain revisions in the methods of estimating costs. The

(Testimony of Will T. Neill.)

examiners reviewed substantially all of the company's priced inventory; applied engineering tests to the property on which costs had been estimated; reconciled closely such recorded costs or averaged units costs determined in the 'Estimated Cost of Construction' schedules; verified the classification of property by accounts; test checked the application of recorded book overheads; made certain verifications of the physical inventory as of July 1, 1933, and test-checked projections to December 31, 1936; examined [298] schedules and supporting work sheets prepared by the company in connection with its study; inspected accounting records and related supporting documents; and made a field inspection of certain major units of physical plant.

'The staffs determined adjustments necessary to reflect the results obtained through the company's restudy of plant, including the cost of its Powerdale Hydroelectric generating station and certain land and land rights.

'The staffs are of the opinion that the company's priced inventory, after application of the adjustments hereinafter set forth, can be accepted as representing the original cost of the company's electric plant as of December 31, 1936. This acceptance is predicated on its relationship with the 'Estimated Cost of Construction' schedules as adjusted by the staffs, for which the priced inventory had provided a more accurate classification by accounts. It is also based on the cost of plant as shown by the company's plant accounts reflecting

(Testimony of Will T. Neill.)

its own construction and recorded construction costs of plant acquired from others, and certain estimates. Original cost of plant on an estimated basis represents approximately (7) per cent of the total.' "

That is a quotation, also, from the Joint Board Report, page 20, Exhibit 16 for identification.

Q. Now, after the Company's receipt of the Joint Report, which was on July 7, 1941, what attention did the staff of the [299] Company under your direction give to the comments and analyses and suggestions contained in the Joint Report?

A. Immediately upon the receipt of the staffs' Joint Report, the Company undertook a complete analysis of all the recommendations made in the Joint Report, which is Exhibit 16, for the purpose of determining what, if any, further studies which it did not have already under way could be made in order to dispose of some of the recommendations; and we have been prosecuting that work diligently ever since the Joint Report was received. [300]

Q. I would like to have you take up the proposed adjustments, item by item, and give us a brief statement as to what treatment has been accorded by the Company in its revised statements to those proposed adjustments. [302]

A. As I said before, those comments with respect to these various adjustments start on page 5 of the Introductory Statement in the document marked for identification as Exhibit 17. [303]

(Testimony of Will T. Neill.)

Q. Have you, in concluding, any general observation that you care to make about the Company's adjustments and the treatment which the Company has made on those adjustments?

A. Yes. I think we might refer to page 12 of the Introductory Statement, Exhibit 17, on the top of the page, which contains this statement, by comparing the Company's treatment of the examiners' proposed adjustments with the recommendations pertaining thereto contained in the Joint Report, it will be noted that the Company and the staffs are in accord as to the "Original Cost" (as defined by the Commission to exclude any restatement of unrecorded costs) of the various items of property to be recorded in Account 100.1, Electric Plant in Service, and Account 100.2, Electric Plant Leased to Others; and that such differences as now exist between the Company's Revised Statements and the recommendations of the Joint Report relate exclusively to the particular [352] Adjustment and other Accounts in which it is believed the differences between cost to utility and such original cost should be recorded.

Q. I believe now, Mr. Neill, we have finished the discussion of your Introductory and Explanatory Statement in Exhibit 17. I wish you would now take up the presentation of Revised Statement B. Perhaps we might save time by referring directly to Revised Statement B, to the Foreword, and give it directly as it is given to us there.

(Testimony of Will T. Neill.)

A. Our Revised Statement B starts with the title of the page being "Revised Statement B—Page 1", which is followed by an introductory foreword, starting on Revised Statement B—Page 2. I think the easiest way to present this material is to read it, which I shall do, starting at the top of "Revised Statement B—Page 2".

Q. Exhibit 17?

A. Exhibit 17. (Reading) "The text of the [353] Commission's Order of May 11, 1937, with respect to Statement B is as follows:

"Statement B showing for each acquisition by the reporting company or any of its predecessors of an electric operating unit or system, the original cost, estimated, if not known, the cost to such company and the amount entered in the books in respect thereto as of the date of acquisition. If the depreciation, retirement or amortization reserve was adjusted as of the date of acquisition and in connection therewith, a full disclosure of the pertinent facts should be made. The difference between the original cost and the amount entered in respect thereto of each acquisition of an electric operating unit or system, as of the date of acquisition, should be clearly stated, and a summary of all transactions affecting such difference between the date of the respective acquisition and January 1, 1937, and the resultant amount on the latter date, should be set forth. The amount to be included in Account 100.5, Electric Plant Acquisition Adjustments, as of January 1, 1937, shall be subdivided so as to show the amounts applicable

(Testimony of Will T. Neill.)

to (a) electric plant in service, (b) electric plant leased to others, and (c) electric plant held for future use. Whenever practical, such amount shall be classified according to nature, i.e., going value, structural value, etc. [354]

“ ‘Where estimates are used in arriving at original cost or the amount to be included in Account 100.5, a full disclosure of the method and underlying facts should be given. The method of determining the original cost of the electric plant acquired as operating units or systems should be described in sufficient detail to permit a clear understanding of the nature of the investigations which were made for that purpose.’ ” [355]

Q. At that point, Mr. Neill, probably it would be helpful if you would turn to Revised Statement B, page 15, and indicate what that sheet disclosed.

A. Revised Statement B, page 15, is a sheet on which we have shown the plant account entries of the Pacific Power & Light Company grouped for purposes of reclassification as of December 31, 1936, showing a total of \$33,865,609.21.

Q. As that statement indicates, your total plant account as of January 1, 1937 in the process of reclassification could be broken down into some twenty separately designated acquisitions of operating properties from predecessors; does it not?

A. That is correct.

Q. Plus the gross plant additions and retirements?

A. Yes. The first twenty items in this state-

(Testimony of Will T. Neill.)

ment, which are numbered as to acquisitions, 1 to 20, are amounts which are included in the total final amount of \$33,865,609.21 as representing the cost to the Company of those several acquisitions,—twenty of them.

Q. So that when you are talking in your Revised Statement B and in the “Foreword to Revised Statement B”, about your acquisitions, you are actually referring to the group listed in that exhibit, as shown on page 15 of Revised Statement B; is that correct?

A. That is right. [356]

Q. Now, go back to Revised Statement B, page 2, and pick up where you left off.

A. (Reading) “This Revised Statement B embodies the results of the further studies and analyses upon which the Company has been actively engaged since the filing of the original Statements on July 3, 1940. The method which the Company finally found necessary to adopt, as the most accurate means of determining ‘original cost’ of the property in service on December 31, 1936, as described on pages 3 and 4 of the foregoing Introductory and Explanatory Statement, dealt only with the various units of property remaining in service on the latter date, and did not provide a workable basis for determining the ‘original cost’ by acquisitions of the various properties acquired from predecessor operating utilities over the period from July, 1910, to December 31, 1936.

“At and prior to the time of filing its original Statement B, the Company’s staff was crowded to

(Testimony of Will T. Neill.)

the utmost with the vast amount of detail work necessary to complete the original cost studies, pursuant to the method finally found necessary for that determination, and to compile the results of those studies in proper form for filing by July 1, 1940, the date to which the Company had petitioned the Commission for an extension. It was then found impossible to formulate any method which seemed to offer the possibility of an accurate [357] determination of the original cost at time of acquisition of each of the various operating properties acquired by the Company from others in the years 1910 to 1936, inclusive, and the amount of the 'acquisition adjustment' applicable thereto. In the circumstances, the Company was obliged to submit its original Statement B without such segregation and with only a general explanation of the cost to the Company of the various acquisitions.

"The Joint Report comments in part on the Company's failure to accomplish this task, as follows:

'The Company has not made a study to determine the original cost of acquired property at dates of acquisition necessary to the proper classification of related adjustments with respect to Account 100.5, Electric Plant Acquisition Adjustments, and Account 107, Electric Plant Adjustments. Consequently, the examiners have established such adjustments in Account 107, Electric Plant Adjustments, pending the preparation of a study by the company to determine proper allocation.'

and we assume that paragraph (e) of the recitals

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in the Commission's order of July 1, 1941, as well as sub-paragraph (i) of paragraph (C) of said order, relate in part at least to the examiners' criticism of Statement B as originally filed.

“Since filing its original Statements, the Company has undertaken anew to solve the problem of determining ‘original [358] costs’ by acquisitions, using for that purpose what now appear to it the most reliable, factually supported premises available for the purpose, and to tie-in the costs so determined with the ‘original costs’ as more accurately determined by the priced inventory as of January 1, 1937. Each acquisition has been carefully analyzed, its components have been traced back to their origins where possible, and the results of the analyses have been assembled in tabular form for each acquisition. In each instance, the methods, underlying facts, and premises relied upon are disclosed, and we believe ‘in sufficient detail to permit a clear understanding of the nature of the investigations which were made for that purpose’.

“The results so developed are shown on a summary sheet, entitled ‘Reclassification Summary Statement’, appearing as page 47 of this Revised Statement B. This Summary Statement assembles, under the various column headings there shown, by acquisitions and by totals, the results of the reclassification studies reflected in the Revised Statements; and it includes a reconciliation of the totals of such ‘original’ and ‘acquisition’ costs by acquisitions, with the total of the ‘priced inventory’ cost determina-

(Testimony of Will T. Neill.)

tion referred to in the quotation from the Joint Report set out on page 4 of the foregoing Introductory and Explanatory Statement. The classification by detailed plant accounts is presented in Revised Statement F, and is made as there shown on the basis of the 'priced in- [359] ventory'.

"In determining the amounts to be included in Account 100.5, Electric Plant Acquisition Adjustments, with respect to the various acquisitions so analyzed in Revised Statement B, the Company has proceeded on the premise, and takes the position, that total 'cost to the utility' of the properties obtained on each of these acquisitions is the total cost recorded on the Company's books at the time of acquisition, computed on the basis of the cash exchanges if any involved, and the par or stated value of the securities or obligations issued or assumed in the transactions; and, consequently, that the entire excess of such cost to the Company of the operating and leased electric properties, over the 'original cost' of such properties determined as set forth in the Revised Statements and subject to the reservation in respect thereof previously stated, should be recorded in Account 100.5 Electric Plant Acquisition Adjustments." [360]

Q. I wish you would take up that part of your foreword of the Revised Statement B that deals with the matter of segregation of the acquisition adjustment costs, and present that in such form as you see fit.

A. This part of foreword in Revised Statement

(Testimony of Will T. Neill.)

B, begins at the center of page 5 of the Revised Statement B, and reads as follows:

“Segregation of Acquisition Adjustment Costs.

“The text of the Commission’s Order of May 11, 1937, quoted above at page 1 of this Revised Statement B, provides in part:

“‘The amount to be included in Account 100.5, Electric ~~Plant~~ Acquisition Adjustments, as of January 1, 1937, shall be subdivided so as to show the amounts applicable to (a) electric plant in service, (b) electric plant leased to others, and (c) electric plant held for future use. Whenever practical, such amount shall be classified according to nature, i.e., going value, structural value, etc.’

“The only possible ‘subdivision’, of any amount shown in Account 100.5 in the Company’s Revised Statement B, is with respect to the amount of \$486,744.98 incurred by the Company as an acquisition adjustment cost in connection with the [367] acquisition of operating electric properties in the 1930 transaction. As appears on the Summary Statement, page 47 of Revised Statement B, some of these properties are classified in Account 100.1, Electric Plant in Service, and some in Account 100.2, Electric Plant Leased to Others;

“On page 8 of the foregoing Introductory and Explanatory Statement filed herewith, the following reference is made to an item of \$1,260,400 discussed on page 30 of the Joint Report:

“‘As will appear in the Company’s Revised Statement B, [368] the Company has found after further

(Testimony of Will T. Neill.)

studies and consideration that it is not practicable to classify the total in Account 100.5, Electric Plant Acquisition Adjustments, by amounts 'according to nature'; and this \$1,260,400, along with other amounts, is included in the Revised Statements as part of the total of Account 100.5.'

"The above quoted comment applies generally not only to the \$1,260,400 there referred to, but to all of the amounts classified in Account 100.5 in the analyses of the twenty separate acquisitions of utility property by the Company, the results of which are tabulated on the 'Summary Statement'. It will be noted that the first fourteen (14) of these acquisitions occurred 25 years or more ago; that the most important of these from a cost standpoint occurred in the years 1910 and 1911; and that, of the remaining six acquisitions, the only one of substantial size was No. 19, on July 31, 1930, on which the Account 100.5 acquisition adjustment cost is shown as \$486,744.98, on the basis of excess of cost to Pacific over so-called 'original cost' of the properties acquired at that time.

"The aggregate of the Account 100.5 acquisition adjustment costs on all acquisitions, plus certain of such costs aggregating \$14,177.27 shown on the Summary Statement in Column 5 opposite 'gross plant additions', is \$7,019,528.20, after giving effect to an offsetting item amounting to \$138,485.84, as shown on the Statement; and of this net total [369] all but \$488,269.86, and the \$14,177.27 so classified with 'gross plant additions', is classified in connection

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with acquisitions antedating July 1, 1916. Of these, the largest item of acquisition adjustment cost was the item of \$6,239,335.1 (last figure illegible) involved in the acquisition of properties at the time of the Company's organization in July of 1910."

Mr. Laing: At this time, Mr. Examiner, I should like to offer for identification a copy of the minutes of the meeting of the Board of Directors of the Pacific Power & Light Company held on July 23, 1910.

Trial Examiner: It will be marked for identification as Exhibit No. 20.

(The Document Referred to Was Marked Exhibit No. 20 for Identification.)

Mr. Laing: I am offering this exhibit, No. 20, for identification at this time, Mr. Examiner, to indicate the scope and nature of the acquisition in July of 1910 and the offer of Weld M. Stevens to the Company on the basis of which the 1910 acquisition was consummated. The offer is made primarily for the purpose of providing information in the record as to the nature of that acquisition, if it is acceptable.

Mr. Slaff: I have no objection to its coming into evidence, Mr. Examiner.

Trial Examiner: Exhibit No. 20 will be received.

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(Testimony of Will T. Neill.)

HEARING EXHIBIT No. 20

Minutes of Special Meeting

Board of Directors

Pacific Power & Light Company

July 23, 1910

A special meeting of the Board of Directors of Pacific Power & Light Company was held at 71 Broadway, New York City, on Saturday, the 23rd day of July, 1910, at 12:30 o'clock in the afternoon, pursuant to a waiver of notice signed by all the directors of the company, of which the following is a true copy:

The undersigned, being all the directors of Pacific Power & Light Company, a corporation of the State of Maine, hereby waive notice of the time, place and purpose of a special meeting of said Board of Directors and consent that the same may be held at 71 Broadway, New York City, on Saturday, the 23rd day of July, 1910, at 12:30 o'clock P. M., for the transaction of such business as may come before the meeting.

Dated, New York, July 23, 1910.

R. J. McClelland

A. E. Smith

E. W. Hill

R. U. Fitting

G. J. Anderson

C. M. Hamilton

E. F. Roehn

(Testimony of Will T. Neill.)

F. F. Baker

E. W. Freeman

A. C. Dickson

James G. Campbell

William Reiser

H. B. Squier

E. P. Summerson

O. R. McMahon

There were present Messrs. E. W. Hill, A. E. Smith, R. U. Fitting, E. P. Summerson, H. B. Squier, A. C. Dickson, C. M. Hamilton, E. F. Roehn, O. R. McMahon, F. F. Baker, E. W. Freeman and J. G. Campbell.

Mr. A. E. Smith, the Chairman of the Board, acted as Chairman of the meeting, and Mr. E. P. Summerson, the Secretary of the Company, acted as Secretary of the meeting.

Mr. E. P. Summerson tendered to the meeting his resignation as Secretary of the company.

On motion duly seconded, Mr. Summerson's resignation as Secretary of the company was accepted.

On motion, duly seconded, Mr. E. P. Summerson was unanimously elected Assistant Secretary of the company.

On motion, duly seconded, Mr. George F. Nevins was unanimously elected Secretary and Assistant Treasurer of the company.

On motion, duly seconded, Mr. Guy W. Talbot was unanimously elected a Vice President of the company.

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On motion, duly seconded, Mr. Edward Cookingham was unanimously elected a Vice President of the company.

On motion, duly seconded, Mr. L. A. McArthur was unanimously elected an Assistant Treasurer and an Assistant Secretary of the company.

On motion, duly seconded, the following resolution was unanimously adopted:

Resolved that all funds of this company on deposit in any bank or trust company, or other financial institution, shall be subject to withdrawal upon checks signed by the Treasurer or Assistant Treasurer or Cashier and countersigned by the Chairman of the Board or the President or any one of the Vice Presidents.

The Chairman presented to the meeting a communication from Weld M. Stevens offering to subscribe for one million five hundred thousand Dollars (\$1,500,000) par value of this Company's seven per cent. cumulative preferred stock, and Five million, nine hundred and ninety-seven thousand Dollars (\$5,997,000) par value of this company's common stock, upon the terms therein stated. The following is a true copy thereof:

July 23, 1910.

Pacific Power & Light Company,

Dear Sirs:—

I hereby subscribe for One million five hundred thousand Dollars (\$1,500,000) par value of your seven per cent. cumulative preferred stock, and Five

(Testimony of Will T. Neill.)

million nine hundred and ninety-seven thousand Dollars (\$5,997,000) par value of your common stock, the same being all your authorized capital stock not at the present time subscribed for. This subscription is made with the understanding that I may pay all thereof in cash, or, if I so elect, that I may pay Two hundred and fifty thousand Dollars (\$250,000) in cash from time to time as required by you, and the remainder by causing to be conveyed and transferred to you the following property:

A. (1) All of the property, real, personal and mixed, of the Astoria Electric Company, a corporation of the State of Oregon, free and clear of all encumbrances except

(a) A mortgage made by said Astoria Electric Company to Security Savings & Trust Company as Trustee dated April 1st, 1902, to secure an issue of \$150,000 of first mortgage bonds of which bonds the aggregate principal amount of \$150,000 are at present outstanding;

(b) Current liabilities at the time of transfer as hereinafter provided, not including any notes made by said Astoria Electric Company to the order of American Power & Light Company or any other indebtedness of said Astoria Electric Company to American Power & Light Company.

(2) All property, real, personal and mixed of the Yakima-Pasco Power Company, a corporation of the State of Washington, excepting only the two following contracts:

(a) One made by Robert E. Strahorn with

(Testimony of Will T. Neill.)

Northern Pacific Irrigation Company, dated September 21, 1908; and

(b) One made by Yakima Valley Power Company with Pasco Reclamation Company, dated December 10th, 1909;

said property to be conveyed free and clear of all encumbrances except the following:

1. (As to the property formerly owned by Northwest Light & Water Company) a certain mortgage made by Yakima Water, Light & Power Company to Security Savings & Trust Company, trustee, dated July 1, 1902, to secure an authorized issue of \$500,000 of bonds, \$133,000 in aggregate principal amount of which bonds are at present outstanding; exclusive of the amount of said bonds which I hereinafter agree to deliver to you.

2. (As to the property formerly owned by Northwest Light & Water Company) a certain mortgage made by said Company to Washington Safe Deposit & Trust Company, as trustee, dated November 1, 1905, to secure an issue of \$230,000 in aggregate principal amount of bonds, of which \$63,000 in aggregate principal amount of said bonds are at present outstanding; exclusive of the amount of said bonds which I hereinafter agree to deliver to you.

3. (As to property formerly owned by Yakima Valley Power Company) a certain mortgage made by said Company to Spokane & Eastern Trust Company, as Trustee, dated December

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15th, 1908, to secure an authorized issue of bonds aggregating \$300,000 in principal amount of which \$14,000 in aggregate principal amount of bonds are now outstanding, exclusive of the amount of said bonds which I hereinafter agree to deliver to you.

4. Current liabilities at the time of transfer as hereinafter provided, not including any notes made by Yakima-Pasco Power Co. to the order of American Power & Light Company or to the order of General Electric Company, or any indebtedness of any kind of said Yakima-Pasco Power Company to said American Power & Light Company.

(3) All the property, real, personal and mixed, of the Columbia Power & Light Company, a corporation of the State of Washington, free and clear of all encumbrances except:

1. A certain mortgage given by Walla Walla Gas & Electric Company to Wells Fargo and Company, trustee, dated December 1, 1900, to secure an authorized issue of bonds aggregating \$100,000 in par value, whereof \$81,000 in aggregate principal amount are now outstanding;

2. A certain mortgage given by Northwestern Gas & Electric Company to Real Estate Trust Company of Philadelphia as trustee, dated September 15, 1903, to secure an authorized issue of bonds aggregating \$650,000 in par value,

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whereof \$526,000 par value in aggregate principal amount are now outstanding; and

3. All liabilities of Northwestern Corporation, if any, under a certain lease made by Walla Walla Valley Traction Company to Northwestern Gas and Electric Company, dated July 2, 1906, and recorded in the office of the auditor of Walla Walla County in book 104 of deeds at page 195, and in the office of the recorder of Umatilla County in volume 49 of deeds at page 517.

4. Current liabilities at the time of transfer as hereinafter provided, not including any notes made by Columbia Power & Light Company to the order of American Power & Light Company or to the order of General Electric Company, or any other indebtedness of said Columbia Power & Light Company to said American Power & Light Company.

(4) All of the capital stock of the Walla Walla Valley Railway Company, a corporation of the State of Oregon, except directors' qualifying shares.

B. (1) One hundred thirty-seven thousand dollars (\$137,000) in aggregate principal amount of the First Mortgage Five Per Cent. Gold Bonds of Yakima Water, Light & Power Company, secured by a mortgage or deed of trust made by that company to Securities Savings & Trust Company, as trustee, and dated July 1st, 1902.

(Testimony of Will T. Neill.)

(2) One hundred sixty-seven thousand dollars (\$167,000) in aggregate principal amount of the Five Per Cent First Mortgage Gold Bonds of Northwest Light & Power Company, secured by a mortgage or deed of trust made by that company to Washington Safe Deposit & Trust Company, as Trustee, dated November 1, 1905.

(3) Two hundred eighty-six thousand dollars (\$286,000) in aggregate principal amount of the Five Per Cent First Mortgage Gold Bonds of Yakima Valley Power Company, secured by a certain mortgage or deed of trust from said company to Spokane & Eastern Trust Company, as Trustee, dated December 15, 1908.

In case I elect to pay my said subscription by the transfer and conveyance of the properties above referred to, it is understood and agreed:

1. That the transfer is to take place as of July 1, 1910. You will be entitled to receive as of that date all of the current assets and cash on hand of the Astoria Electric Company, Yakima-Pasco Company and Columbia Power & Light Company;

2. That you will assume and agree to pay the current liabilities referred to in subdivisions "(1)", "(2)" and "(3)" of paragraph "A" above, and also any bonds not to be conveyed to you outstanding under any of the mortgages referred to in subdivisions "(1)", "(2)" and "(3)" of paragraph "A" above.

3. That you will make, issue and deliver to

(Testimony of Will T. Neill.)

me, or upon my order, First and Refunding Mortgage Five Per Cent Twenty Year Gold Bonds of your company of the aggregate principal amount of Three million two hundred thousand Dollars (\$3,200,000) secured by a mortgage and deed of trust in form satisfactory to me and covering the property to be transferred and conveyed to you by me.

If my proposition is acceptable to you, will you kindly accept the same promptly in writing, and oblige

Yours truly,

WELD M. STEVENS.

On motion, duly seconded, it was unanimously

Resolved, that the subscription of Weld M. Stevens for \$1,500,000 par value of this company's seven per cent. cumulative preferred stock, and \$5,997,000 par value of this company's common stock, in the form presented to this meeting, and the terms thereof, be and are accepted and that the officers of this company be and are authorized and directed to notify said Weld M. Stevens in writing of this company's acceptance of his proposition and to take all steps necessary, proper or convenient for the performance by this company of each and every obligation assumed by it by the acceptance of said proposition.

On motion, duly seconded, the meeting adjourned.

E. P. SUMMERSON,

Asst. Secretary.

(Testimony of Will T. Neill.)

Q. Now, you have just explained that the largest acquisition adjustment of this whole list was the item of \$6,239,335.19, which was involved in connection with the acquisition of the properties at the time of the Company's organization in July of 1910, which was the acquisition, is it not, that was reflected in the minutes of the Directors' meeting of July 23, 1910? [371]

A. It is, yes.

Q. In Exhibit 20. Now, will you take up your discussion of that first acquisition and explain what the problem confronting you was in connection with trying to subdivide or classify it?

A. I will read from the beginning of the second paragraph on page 7 of the Revised Statement B.

“Referring to this first major item, the Company, after further study and consideration, has reached the conclusion that no accurate basis now exists for segregating the total of \$6,239,335.19 ‘according to nature’ of its components. This amount constitutes the difference between the cost to Pacific and the ‘original cost’ of the electric utility property acquired by Pacific in 1910, as determined in the manner and subject to the reservation referred to in Revised Statement B. The present officers of the Company have no knowledge, or means of knowledge, thirty years or more after the event, as to the weights which may have been given by the directors of the Company in 1910 to the various elements of value inherent in the properties so acquired in July of that year.

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“In our opinion, however, this 1910 acquisition adjustment cost represents the then directors’ judgment as to the net effect of all of the elements, then actually or potentially present, of appreciation over original cost to the first utility users, as now determined in the manner stated. Among such [372] elements, we believe, were the following: any increase in structural values and costs over such ‘original cost’ of the properties so acquired; such values and costs as may have been attributable to the integration of the various properties, in the course of their development in the hands of the 43 predecessor owners indicated on the chart on page 23 of Statement A, these being values and costs which would not be reflected in such ‘original cost’ statement; the going value, or the value of the then established and acquired business and properties, over the bare bones cost of the physical properties; the added values contemplated from the consolidation and further integration of these properties into a more efficient operating system under competent and experienced utility management, and under the sponsorship of a holding company in a position to assist Pacific in financing its future growth and development; the added values contemplated from the aggressive development of the electric business with improved service and more favorable rates, and in a territory presenting favorable opportunity for rapid growth and for new and increased uses of electric service; and such values as may have been attributed to the water

(Testimony of Will T. Neill.)

rights appurtenant to the hydroelectric plants to be acquired in the transaction, over and above their 'original cost' as so determined. These and perhaps other elements may have entered into the determination of values underlying the incurring of such acquisition adjustment costs at that time; but as indicated [373] above, any attempt at this time to segregate these elements by specific amounts 'according to nature' would be almost wholly speculative, and for that reason is deemed impracticable.

"The next acquisition adjustment cost shown on the Summary Statement is the amount of \$23,759.81, arising in connection with Acquisition No. 2, the electric properties of Husum Power Company, which were bought by Pacific Company directly from the original owners in 1911. The acquisition cost there shown represents the difference between cost to Pacific Company, or the 1911 market value as determined by the purchase price, and the 'original cost' as determined for the purposes of this Statement. This appreciation would cover any increase in structural values and costs which may have existed, any going value developed in the property, and any other elements of value inherent in the property at the time of the purchase.

"On Acquisition No. 3, The Prosser Power Company, an acquisition adjustment cost of \$5,738.56 is shown in Column 5 of the Summary Statement, as compared with a presently determined 'original cost' in Account 100.1 of \$80,968.99. The acquisition adjustment cost is relatively small, and may

(Testimony of Will T. Neill.)

properly be attributed to increased structural values or costs and to going value, either or both. In any event, it represents the appreciation, measured by the difference in market value on an arm's length purchase, over the presently determined 'original cost'. In this case also, the properties had [374] passed through various ownerships prior to Pacific's purchase in 1911, which doubtless involved some integration costs and values not reflected in presently estimated 'original cost'.

"On acquisition No. 5, Hood River Light & Power Company, an acquisition adjustment cost of \$164,979.19 is shown in Column 5 of the Summary Statement, as compared with a presently determined 'original cost' in Account 100.1 of \$81,572.56. This acquisition was made by the Pacific Company from the last of three owners of the properties involved, and the acquisition adjustment cost must be assumed, as in the case of the 1910 transaction, to represent all of the elements of value and cost, as reflected by the market or purchase price, deemed to inhere in the properties at the time of the purchase. A similar explanation applies to Acquisition No. 6, the Tucannon Power Company, as to which an acquisition adjustment cost of \$39,260.64 is shown in Column 5, as compared with a presently determined 'original cost' in Account 100.1 of \$52,104.26; and to Acquisition No. 7, Dayton Electric Company, as to which an acquisition adjustment cost of \$40,648.17 is shown,

(Testimony of Will T. Neill.)

as compared with a presently determined 'original cost' in Account 100.1 of \$56,761.37.

"With respect to Acquisition No. 12, Hydro Electric Company, an acquisition adjustment cost of \$115,718.63 is shown in Column 5, as compared with presently determined 'original cost' in Account 100.1 of \$68,290.50. This property was [375] acquired by Pacific in 1915. The basis of the determination of original cost is explained in Statement 12, Acquisition No. 12, on page 31 following. That analysis proceeds on the assumption, however, that the 'original cost' of the lands and water rights involved was the \$15,034.91 presently estimated from deed records as the market value in 1909 of ordinary acreage in the Hood River Valley. Actually, further analysis discloses that the first owner to put these particular lands and water rights to electric utility use was Hydro Electric Company, which was organized early in 1911 by the owners of two substantial blocks of riparian lands and water rights along the stream of Hood River, one block of which had been partially developed for power to operate a local mill, but which was not operated as a public utility until Hydro Electric Company constructed its electric power plant on these lands and engaged in furnishing electric service by means thereof. (See Statement A, pages 83 and 84).

"The owners of these two blocks of land and water rights, N. C. Evans and Watt Development

(Testimony of Will T. Neill.)

Company, transferred their respective properties to Hydro Electric Company for a price of \$150,000, paid one-half to each in the capital stock of the company in that amount of par value; and from an accounting standpoint, it appears that this \$150,000 might properly be taken as the 'original cost' of these lands and water rights. If that were done, the acquisition adjustment cost of [376] \$115,718.63 now shown in Column 5 of the Summary Statement would be converted into a red figure, or a credit to the acquisition adjustment account, in the amount of \$19,246.46. In any event, it is fair to assume that this \$115,718.63, now classified under Column 5 as acquisition adjustment cost to Pacific, includes recognition of values greatly in excess of the \$15,034.91 used in the Revised Statement B for these lands and water rights (for which Hydro Electric Company paid \$150,000 in its capital stock), as well as recognition of whatever going value the business may have developed at the time of Pacific's acquisition. In view of the competitive situation which prevailed for a time between Hydro Electric Company and Pacific, it is also fair to assume that the purchase price to Pacific may have been influenced by and have included recognition of a 'nuisance value' of the properties in the hands of the original stockholders of Hydro Electric Company."

By Mr. Laing:

Q. Mr. Neill, when you refer to Column 5, you

(Testimony of Will T. Neill.)

are talking about this Reclassification Summary Statement that appears on page 47 of the Revised Statement B? A. That is correct.

Q. Where each of these acquisition adjustment accounts is listed in Column 5, that is about the middle of the statement, is that correct?

A. That is correct. I thought we had made that plain. [377]

Q. I just want to emphasize it.

A. (Continuing) "On acquisition No. 13, Seaside Light and Power Company, an acquisition adjustment cost of \$21,683.76 is shown in Column 5, as compared with a presently determined 'original cost' in Account 100.1 of \$65,000. The acquisition adjustment cost there shown represents the difference between cost to Pacific Company, or the 1916 market value as determined by the purchase price, and the 'original cost' as determined for the purpose of this Statement. This appreciation would cover any increase in structural values and cost which may have existed in 1916, any going value then developed in the property, and any other elements of value inherent in the property at the time of its purchase by Pacific. Similar comment would apply to the \$1,512.62 of acquisition adjustment cost shown in Column 5 with respect to Acquisition No. 17, Cannon Beach Electric Company, as to which an 'original cost' of \$1,705.69 is shown in Account 100.1. [378-382]

Mr. Laing: Mr. Examiner, I would like to offer at this time an exhibit for identification. It

(Testimony of Will T. Neill.)

is a copy of the minutes of the Board of Directors of the Pacific Power & Light Company, held July 29, 1930, at which the major acquisition of 1930 was authorized by the Board of Directors of the Pacific Power & Light Company. I want to say with regard to these minutes that I have had made a complete copy of the minutes of the meeting, with the exception of certain documents, the [383] omission of which is noted, which consisted of the form of coupon bonds and things of that kind, and a detailed description of certain properties which seemed unnecessary for this purpose to incorporate in the minutes.

Trial Examiner: It will be marked for identification as Exhibit 21.

(The document referred to was marked Exhibit No. 21 for Identification.)

Mr. Laing: Have you any objection to that going in as an exhibit?

Mr. Slaff: No; there is no objection.

Trial Examiner: All right. Exhibit 21 will be received.

(Exhibit No. 21 Was Received in Evidence.)

By Mr. Laing:

Q. Mr. Neill, will you take up Acquisition No. 19, which is the one that occurred in July of 1930, to which reference is made in these minutes now introduced in evidence as Exhibit 21, and tell us about the acquisition adjustment costs involved in that transaction.

(Testimony of Will T. Neill.)

A. I will start at the top of page 12 of Revised Statement B, immediately following the line on which I made the correction just before the noon recess. (Reading)

“The principal remaining acquisition adjustment cost is the amount of \$486,744.98, on Acquisition No. 19, Inland Power & Light Company properties, involved in the 1930 acqui- [384] sition. As previously stated and as shown on the Summary Statement, \$203,526.40 of this cost is allocated to the \$1,156,766.25 of original cost of property in Account 100.2, Electric Plant Leased to Others; and the remainder, or \$283,218.58, is allocated to the \$2,341,891.73 of property in Account 100.1, Electric Plant in Service. The Company knows of no practical method of breaking down the \$486,744.98 of acquisition adjustment costs, ‘according to nature’ of its components. It would cover any increases in structural values and costs that may have existed, any going value that may have been developed in the properties, and any other elements of value inherent in the properties, at the time of their acquisition by Pacific. [385]

Q. Let us pass for the moment to Revised Statement I and tell us about that.

A. Revised Statement I is a statement required by the Commission’s order of May 11, 1937 for showing certain statistical information relative to various classes of electric plants, including production plants, transmission plants, distribution plants, and other classes of property. [453]

(Testimony of Will T. Neill.)

I will read what is stated in the Foreword to Revised Statement I.

“Revised Statement I embodies the revisions of former Statement I which were made necessary by changes in the determination of ‘original costs’ of electric property as of January 1, 1937, resulting from adjustments recommended in the Joint Report and accepted by the Company, and from changes in the classification of certain properties between Transmission and Distribution.

“The original costs shown in this Revised Statement I are the ‘original costs’ determined as of January 1, 1937, in accordance with the Uniform System of Accounts and the Commission’s interpretation thereof, to which reference has been made in the foregoing Introductory and Explanatory Statement; and the statement of such ‘original costs’ in Revised Statement I is subject to the explanation and to the reservation of rights set forth on pages 12 to 15 of said Introductory Statement.”

Q. Now, this Revised Statement I consists of some sixteen additional pages?

A. That is correct.

Q. Which, as I understand it, are purely statistical compilations, and the revisions made from the former Statement have been spoken of in general terms in that Foreword. Is there any additional explanation that you feel is necessary, [454] Mr. Neill?

A. I think the only additional explanation I

(Testimony of Will T. Neill.)

might make with respect to this is that the original cost is subject to the reservations which I have just read, which are the original costs revised to reflect the recommendations in the Joint Report which are accepted by the Company. The other changes consist primarily of the reclassification of the transmission and distribution plants, along the same line that I spoke of yesterday, in connection with the revision of parts of which, in which the first original cost reclassification was based on a little different classification of lines and substations, between distribution and transmission, than is the revised classification. That change is reflected in Revised Statement I.

Q. So far as you know, Mr. Neill, are there any differences between you and the joint examiners with respect to the matters shown in Revised Statement I?

A. I believe not. During the examination, we agreed with the examiners, both of the Federal Power Commission and of the Oregon Public Utilities Commissioner, as to the classification of lines and substations; and, so far as I know, there are no differences now between us.

Q. Now, let us refer back to your Revised Statement B, Mr. Neill. When we left the discussion of that Foreword to Revised Statement B, I think we had gotten down to the [455] close of the incomplete paragraph at the top of page 13 of Revised Statement B. I wish you would take it up

(Testimony of Will T. Neill.)

from there and discuss the remainder of the Foreword.

A. I believe I should finish reading the Foreword, which is on page 13, Revised Statement B, Exhibit 17: (Reading)

“For convenience of reference, and for whatever interest the presentation of the information in this form may have to the Commission, the Summary Statement includes an analysis, in Columns 6 and 7, —”

By Mr. Laing:

Q. (Interposing) As shown by the Summary Statement you made, page 47?

A. Yes. (Continuing reading) “—of the 100.5 acquisition adjustment costs shown in Column 5.” That, again refers to page 47, Revised Statement B, Column 5. (Continuing) “—to reflect the differences between costs to American and costs to Pacific in the major 1910 and 1930 transactions. Column 6 shows that part of the acquisition adjustment costs in Column 5 which represents the differences between costs to Pacific and the costs to American; and Column 7 shows the remainder of the acquisition adjustment costs, or the amounts in Column 5 less the amounts in Column 6, respectively.

“The figures employed in making the computations under Column 6 are the figures of cost to American which have been supplied by American, at the request of the Commission’s staff, [456] from time to time during the course of the staff’s

(Testimony of Will T. Neill.)

investigation and studies of the original Statements filed with the Commission on July 3, 1940. No consideration has been given in these computations of acquisition adjustment costs to the amount of \$161,500, representing the discount and expense incurred by American on the sale of \$1,250,000 in par value of Pacific's 7% Preferred Stock, received by American as part of the 1910 transaction; or to the amount of \$25,000 of discount incurred by American on the resale to Pacific of the \$500,000 in stated value of the \$6 Preferred Stock of Pacific, which American received in the 1930 transaction. If the aggregate of these two amounts, or \$186,500, of discount and expense so incurred by American in marketing this preferred stock, were taken on Pacific's reclassification statement as Capital Stock Discount and Expense, in Accounts 150 and 151, the amounts now shown as the respective acquisition adjustment costs on the 1910 and 1930 transactions would be correspondingly decreased."

Q. Mr. Neill, at that point, can you give us the source of your information, or, rather, the source of the information that was passed on to the Commissions' staffs with respect to those two items of Capital Stock Discount and Expense, Accounts 150 and 151? You have just referred to them in your reading.

A. Yes. The source of the information from which [457] those figures were derived from the American Power & Light Company were trans-

(Testimony of Will T. Neill.)

mitted to either Mr. Flynn, Mr. O'Neil, or Mr. Pentney on September 10, 1940 and on January 30, 1941.

Q. What amount of additional investment did the American Power & Light Company make in the stock of Pacific Power [458] & Light Company at that time,—in the common stock of the Pacific Power & Light Company?

A. It made an additional investment of common stock of Pacific Company in the amount of \$1,868,767.25.

Q. That investment includes, does it not, the \$25,000 of capital stock discount that was referred to?

A. That is correct.

Q. By examination of the statement that you furnished to Mr. O'Neil with your letter of September 10, 1940, or any other letters that were furnished to the staff in connection with the 1910 transaction, or from any other sources of information, have you been able to arrive at a determination of the American's investment in common stock prior to this increase in 1930?

A. That can be calculated from those statements, and the amount was \$1,009,251.34.

Q. That was prior to 1930?

A. That was prior to the 1930 acquisition,—transaction.

Q. Which would make a total amount as of the end of 1936, or as at the present time of what total?

A. If we add to the \$1,009,251.34 prior to the

(Testimony of Will T. Neill.)

1930 transaction, the increase of American's investment in the common stock of Pacific Company, carrying through the 1930 transaction, the investment of American in Pacific common stock [459] as of December 31, 1936, is \$2,878,018.59.

Q. In giving that figure for the investment prior to the 1930 transaction, you have again assumed as part of American's costs, have you not, \$161,500 of Capital Stock Discount and Expense incurred in connection with preferred stock that went along in that transaction?

A. I have.

Q. And you have also included, I assume, the \$100,000 of common stock that the American bought for cash sometime prior to 1930, have you not?

A. Yes, sir, that was—American bought that 1,000 shares of common stock for cash on May 19, 1915, and that was included in the one million, nine thousand odd amount.

Q. Now, will you take up the concluding paragraph, or page, of your Revised Statement B, and tell us what else you have got to say, Mr. Neill.

A. I will continue reading from page 14 of Revised Statement B.

“It should be understood that the figures of cost to American, referred to in the two preceding paragraphs, reflect only a part of American's investment in and contributions in behalf of the Pacific Company. The latter, in addition to the amount of Pacific's note indebtedness to American

(Testimony of Will T. Neill.)

shown on the balance sheet as of January 1, 1937, in Revised Statement G, and the amount of American's cash invest- [460] ment in Pacific's common stock, may properly be considered as including the very large expenditures made by American from early in 1910 until plans therefor were necessarily suspended several years ago, toward making possible the construction of a major hydroelectric project on the Columbia River at Priest Rapids, as a source of cheap power for industrial development in Pacific's operating territory and for future anticipated requirements of Pacific's growing utility business.

"The Company has furnished to the Commission's staff copies of this Revised Statement B, with detailed data, memoranda, and explanations pertaining thereto and to the studies reflected therein."

Q. That never materialized, did it?

A. No, it did not.

Q. During the period from 1910 to 1920, the problem involved the question of legislation authorizing the construction of such projects, did it not?

A. I believe it did.

Q. Do you remember when the Federal Water Power Act was passed?

A. I believe it was in 1920.

Q. What other problems were involved in getting that project under way after the Federal Water Power Act made it possible to secure licenses

(Testimony of Will T. Neill.)

for the construction of such pro- [461] jects on navigable streams?

A. As I understand that project, the difficulties after the license had been obtained, were due to the fact that a very large project, the support of which would require the development of a great deal of load, particularly industrial load, was a project that required a major expenditure of money. We know that the American Power & Light Company put a great deal of time and effort in surveying certain raw materials which could be used for electro-chemical and electro-metallurgical purposes and other industrial processes. As I understand the situation, it was the magnitude of the project and the coming on of the depression which combined to make the thing unfeasible; that is, for immediate construction, and subsequently, of course, the development of the Federal projects along the Columbia River has further postponed the possibility of construction of that power development.

Q. Approximately what is the location of the Priest Rapids project, Mr. Neill?

A. Well, it is on the Columbia River, best located, I think, by a map in Statement A of—

Q. How about the map on page 6 of Exhibit No. 15? Could you spot it on there?

A. I do not know the exact location of dam-site; but the location of the project, as I understand it,—

(Testimony of Will T. Neill.)

Q. It would be south of Beverley in about where that [462] bend in the river is, isn't it?

A. I was going to say it would be between the towns of Beverley and White Bluffs, down there just at the bend in the river.

Q. Have you any information as to the approximate amount of money the American put into that thing before it found it necessary to suspend?

A. I understand that they invested at least \$4,000,000 without accrued interest in that effort.

Q. They now have the lands, of course, but there is no project built; is that correct?

A. No; they have the lands. Of course, I spoke of the industrial power developments but there is also in connection with this project plans for very heavy irrigation development. This dam that they were proposing to construct in the river would supply both power, and I believe, water necessary for the irrigation of large areas of land in that part of the Columbia River Basin. [463]

Mr. Slaff: Mr. Examiner, I should like to reserve a motion to strike the testimony with respect to the Priest Rapids development and the alleged expenses to American, and so on, that has been the subject of these last few questions and on the subject of some testimony prior to Mr. Neill's reading the last paragraph on page 14 of Statement B, because I think it is entirely irrelevant to this proceeding. Perhaps it would be more convenient if I reserve that motion to strike and when we have a transcript of

(Testimony of Will T. Neill.)

the testimony tomorrow morning and relate it to the exact spot in the testimony.

Trial Examiner: I think perhaps that is true. The Examiner will hear you later on the motion to strike. [465]

Q. I don't like to again have you read your verification of this entire exhibit, but I would like to ask you, Mr. Neill, whether the work that has been done and which is [472] reflected in this exhibit, represents, in your knowledge and opinion, an accurate and full return to the various matters that the Commission has asked for in its Uniform System of Accounts, Instruction 2-D, in its Order of May 11, 1937?

A. I think it does.

Mr. Laing: I would like to offer the exhibit in evidence, Mr. Examiner .

Mr. Slaff: Exhibit 17?

Mr. Laing: Yes.

Mr. Slaff: No objection.

Trial Examiner: Exhibit 17 will be received.

(Exhibit No. 17 was received in evidence.)

Mr. Laing: At the same time, I would like to offer in evidence Exhibit No. 18, which is a copy of a letter of transmittal of this exhibit to the Commission.

Mr. Slaff: No objection.

Trial Examiner: . Exhibit 18 will be received.

(Exhibit No. 18 was received in evidence.)

[473]

(Testimony of Will T. Neill.)

HEARING EXHIBIT No. 18

Pacific Power & Light Company

Public Service Building

Portland, Oregon

September 27, 1941

Air Mail

Federal Power Commission

Washington, D. C.

Re: Reclassification of Electric Plant
Account

FPC Docket No. IT-5611

Dear Sirs:

On July 3, 1940, Pacific Power & Light Company filed with the Commission a volume entitled "Reclassification of Electric Plant—Statements A to I, inclusive", which had been prepared by the Company pursuant to Electric Plant Instruction 2-D of the Commission's Uniform System of Accounts, and to the Commission's order pertaining thereto adopted May 11, 1937. The Company's letter to the Commission of July 1, 1940, transmitting this volume, stated among other things that it might be "necessary to make amendments to or revisions in such statements."

Since that date, the Company has been continuously engaged in making further studies and analyses of the problems involved, and has considered criticisms and suggestions contained in the Joint Report of the examiners for the Commission and the

(Testimony of Will T. Neill.)

Public Utilities Commissioner of Oregon, served on the Company on July 7, 1941, and has had various consultations with the Commission's staff relating to these problems. It has also received and considered the various provisions of the "Order Resuming Hearing and to Show Further Cause" entered by the Commission on July 1, 1941, in Docket IT-5611.

The results of these further studies, analyses and consideration have been compiled in Revised Statements B, E, F, G, H, and I, respectively, with an "Introductory and Explanatory Statement" in the form of a letter addressed to the Commission dated September 26, 1941, all of which have been assembled in a single volume with identifying cover page, these statements being verified by the affidavit of the undersigned dated September 26, 1941. Three signed counterparts of this volume are transmitted herewith for filing with the Commission.

The material assembled in this volume has been made available to the members of the Commission's staff now at Portland in preparation for the hearing on September 29, from time to time as the various statements were compiled. One complete copy of the volume was delivered to the Commission's staff at Portland yesterday, September 26, and additional copies are being delivered to the staff today.

The submission of these Revised Statements is subject to the reservation of rights by the Company set forth in the Company's letter of July 1, 1940, transmitting the original statements, and to the res-

(Testimony of Will T. Neill.)

ervations set forth in the Revised Statements themselves and in the accompanying Introductory and Explanatory Statement, and in the Company's Motion to Dismiss in the proceeding scheduled for hearing on September 29, 1941, transmitted to the Commission today by the Company's attorneys.

In addition to this volume of Revised Statements, the Company also transmits and files herewith three copies each of the four system maps contained in Statement A, showing transmission line and other data as of December 1910, March 1915, November 1924, and December 1936, appearing as pages 64, 85, 90 and 8 (also 114) respectively, of the printed Statement A filed July 3, 1940. The same four maps were assembled in a single long sheet on page 16 of Statement A, which we have not reproduced in these corrected maps. These four revised maps as of said several dates embody certain minor changes found necessary to reflect the Company's present understanding of the Commission's classification of property as between transmission and distribution, as followed in the Revised Statements.

Yours very truly,

WILL T. NEILL

Will T. Neill

Vice President

Q. Mr. Neill, I wish you would take up the matter of Revised Statement H, which is a statement

(Testimony of Will T. Neill.)

which deals with the suggested plan for handling the amounts in these adjustment accounts; and discuss it in such detail as you see fit. Perhaps the simplest way would be for you to present it as you have it in your Exhibit 17.

A. I think that is the fastest way to do it, and the [478] most effective. I shall read the Foreword to Revised Statement H, beginning on page 2 of Revised Statement H: (Reading)

“The Commission’s Order of May 11, 1937, requires each utility, in submitting the information called for in Electric Plant Instruction 2-D of the Uniform System of Accounts, to furnish among other things the following:

‘Statement H giving a suggested plan for depreciating, amortizing, or otherwise disposing in whole or in part of the amounts, as of January 1, 1937, includible in Account 100.5, Electric Plant Acquisition Adjustments, and Account 107, Electric Plant Adjustments.’

and paragraph (C) of the Commission’s Show Cause Order of July 1, 1941, in Docket No. IT-5611, directs the Company among other things to

‘show further cause, if any there be:

* * * * *

‘(iii) Why the Company should not submit a plan for the disposition of the amounts which may be properly established in Account 100.5, Electric Plant Acquisition Adjustments, in accordance with the evidence adduced at said hearing;

(Testimony of Will T. Neill.)

‘(iv) Why the Company should not submit plans for the disposition of the amount of \$9,-694,593.47, classified in Account 107, Electric Plant Adjustments;’

“The Company’s original Statement H, filed with the Com- [479] mission on July 3, 1940, was necessarily based upon its then proposed reclassification of electric plant account, as reflected in Statements B, E, F, and G, submitted at the same time. The Revised Statements B, E, F, and G, filed herewith, reflect the results of the further studies and analyses made by the Company since the date of original filing, as explained in said Revised Statements, and the premises and data from which such results were derived, and necessitate the compilation of Revised Statement H.

“For example, Revised Statement B, for the reasons therein stated, attempts no segregation ‘according to nature’ of the amounts therein shown in Account 100.5, Electric Plant Acquisition Adjustments, as was attempted in the original Statement B; it establishes no ‘credit balance’ in Account 107, as was shown in the original reclassification; and the only amount now classified by the Company in Account 107 is the sum of \$42,554.68 (see Item (3) on page 6 of the Introductory Statement) which the examiners and the Company agree was improperly capitalized as costs of construction, and should therefore be removed from plant account. This Revised Statement H is therefore based upon and deals with the ‘acquisition adjustments’ shown in Revised State-

(Testimony of Will T. Neill.)

ment B; and it also deals with the amounts proposed to be transferred to Account 140, Unamortized Debt Discount and Expense, as shown on the Summary Statement of Revised Statement B, which in [480] the Joint Report (pages 32 to 34) are reclassified, pending disposition, in Account 107, Electric Plant Adjustments.

“Referring now to sub-paragraphs (iii) and (iv) of the Commission’s Show Cause Order of July 1, 1941, in Docket No. IT-5611, the Company has no serious objection (and it did not object at the time of filing its original Statement H) to filing with the Commission as part of its reclassification statement an explanation of the Company’s views and suggestions as to the treatment which should be given to any amounts, as of January 1, 1937, which the Company deems properly classifiable in any of the above numbered Accounts. It does object, however, and it earnestly protests, that the Company should not be required to engage in a speculative determination in advance, in a proceeding or investigation to determine the proper reclassification of the Company’s Electric plant accounts, as to what amounts may finally be determined by the Commission to be properly classified in any so-called Adjustment Accounts, and, on the basis of such speculation, to propose a plan for the disposition of such presently unknown amounts.

“It also protests that the Commission may not reasonably or lawfully require the Company to ‘dispose of’, in the sense of writing off or removing from

(Testimony of Will T. Neill.)

its books of account, any amounts now shown thereon which may represent values inherent in the Company's property; and that the question of [481] the existence of such value is not a matter of accounting, but one requiring judicial investigation and determination on the basis of all relevant evidence of value as of the time of the inquiry. It further protests, in particular, that the requirement of sub-paragraph (iv) referred to above is unreasonable and unlawful, in that, at the present stage of the proceeding, there is no 'amount of \$9,694,593.47, classified in Account 107, Electric Plant Adjustments', such amount representing merely a combination of certain figures referred to in the Joint Report of the examiners (Joint Report, page 31), the proposed reclassification of which has not been accepted, except in part, by the Company, and none of which has yet been passed upon by the Commission. This Revised Statement H is therefore submitted subject to the foregoing objection and protest, and to the reservation by the Company of all of its rights and remedies with respect thereto, and with respect to any assumption of authority by the Commission to order a 'disposition', other than that proposed by the Company, in this Revised Statement H, of any amounts that may finally be held to be properly classifiable in either Account 100.5 or Account 107." [482]

"Account 107, Electric Plant Adjustments: The Company proposes to dispose of the amount of \$42,554.68, reclassified on the Summary sheet of Revised Statement B in Account 107, Electric Plant Ad-

(Testimony of Will T. Neill.)

justments, by crediting Account 107 and charging Account 271, Earned Surplus with the entire amount of \$42,554.68. This proposal is made for the reason that this net amount is now recognized as having been erroneously accrued on the Company's books as a cost of construction and charged to plant account as such.

“Account 100.5, Electric Plant Acquisition Adjustments: The Company proposes to dispose of the amount of \$7,019,528.20, shown on the Summary sheet of Revised Statement B as the total reclassified to Account 100.5, Electric Plant Acquisition Adjustments, by retaining said amount in said Account 100.5 until the time or times of the complete retirement or disposition of the respective systems to which the components of this total respectively apply; and at such time or times to remove from Account 100.5 so much thereof as pertains to the system acquisitions then retired or disposed of.

“In the event of the complete retirement or disposition of any system representing less than the total of one of the several acquisitions listed on said Summary Statement, [485] an apportionment will be made of the amount of the 100.5 acquisition adjustment cost applicable to the entire acquisition, in such manner and on such bases as will fairly reflect the relation of the systems so disposed of or retired to the total acquisition.

“No other dispositions proposed: Except as hereinabove set forth in this Revised Statement H, the Company has no plan for the disposition of any other

(Testimony of Will T. Neill.)

or additional amounts which may ultimately be reclassified in Account 100.5 or in Account 107. The Company takes the position and maintains that the amounts recorded in its Electric Plant Account, after making the adjustments to Account 140 and Account 107, above proposed, are fully supported by present plant values equaling or exceeding the total amounts shown in said Electric Plant Account."

Mr. Laing: That is all, Mr. Neill. You say you desire to reserve cross examination?

Mr. Slaff: I should like to reserve cross examination of Mr. Neill until the entire direct has been presented.

Trial Examiner: Is that agreeable, Mr. Laing?

Mr. Laing: Yes.

Trial Examiner: Very well. You may step down.

[486]

ERNEST C. WILLARD

called as a witness on behalf of the Pacific Power & Light Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Laing:

Q. Will you please state your name and place of residence?

A. Ernest C. Willard. I reside in Portland, Oregon, my office address being 619 Corbett Building in this city.

Q. What is your occupation or profession?

(Testimony of Ernest C. Willard.)

A. I am a Consulting Engineer.

Q. Are you a registered professional engineer?

A. Yes. I am registered as a qualified professional engineer in the states of Oregon, Washington, and New York.

Q. With what professional organizations have you been associated?

A. I am a member of the American Society of Civil Engineers and the American Water Works Association. I am a past president of the Oregon Section of the American Society of Civil Engineers. I also was a charter member of the National Association of Cost Accountants.

Q. What, if any, public or quasi-public positions do you hold? [487]

A. I am a member of the Board of Trustees of Pacific University, Forest Grove, Oregon. I am also a member of the Board of Managers of Oregon Institute of Technology and Multnomah College here in Portland. I am the past chairman and a present member of the Sewer Charge Equalization Board of the City of Portland and a member and Vice-President of the City Planning Commission of the City of Portland.

Q. What has been your educational training and professional experience?

A. I attended Worcester Polytechnic Institute in Worcester, Massachusetts and began my engineering work in 1906 with Civil Engineer and Surveyors, Fitchburg and Lowell, Massachusetts. My work consisted of general engineering and survey-

(Testimony of Ernest C. Willard.)

ing including street railway construction and design and construction of water works. From April 1907 to July 1907 I was with the Boston and Albany Railroad on third track construction and general maintenance.

From July 1907 to September 1908 I was with the Metropolitan Park Commission, Boston, Massachusetts. I was in charge of parties on surveying, road, bridge, seawall, dam, and building construction and general river and park improvements.

From September 1908 to October 1910 I was with the Commissioners of Sewerage, Louisville, Kentucky as draftsman, as senior inspector on construction, in charge of field [488] parties upon location and construction work and later as assistant in charge of resident engineer's office, Northwestern Division being in charge of field parties, preparations of estimates, etc.

From January 1911 to March 1911 I was assistant engineer with the Arnold Company, Chicago, Illinois in connection with the valuation of the Seattle Electric Company being in charge of work in connection with the power plant equipment.

From April 1911 to July 1912 I was assistant engineer with Halbert P. Gillette, Chicago, Illinois, and in that capacity worked on various valuations of public utility properties. I was in charge of the valuation of buildings, power plant equipment, steam heat distribution system, and rolling stock of Seattle Electric Company, Seattle, Washington. I was in charge of the valuation of the Everett Railway Light and Water Company, Everett, Washing-

(Testimony of Ernest C. Willard.)

ton, including the railway system, light and power system and water system. I was also in charge of the valuation of the Whatcom County Railway Light and Power Company, Bellingham, Washington, including the railway system, light and power system, and gas system.

From July 1912 to September 1912 I was retained by Fairhaven City Water and Power Company, Bellingham, Washington and the Raymond Light and Water Company, Raymond, Washington, in connection with valuations and rate investigations.

[489]

From September 1912 to July 1913 I was assistant engineer with William J. Hagenah, Chicago, Illinois doing some work in connection with the valuation of Pacific Power & Light Company and in charge of the valuation of the Track and Roadway system of the Portland Railway Light & Power Company, Portland, Oregon.

From July 1913 to July 1916 I was assistant engineer with Henry L. Gray, Seattle, Washington. During this time I was responsible under Mr. Gray's direction for valuations and rate investigations made in connection with the following properties: Tacoma Railway and Power Company, Tacoma, Washington; Pacific Traction Company, Tacoma, Washington; Puget Sound Electric Company, Tacoma, Washington; Kootenai Power Company, Coeur d'Alene, Idaho; Consumers Water Company, Coeur d'Alene, Idaho; Washington Water Power Company, Spokane, Washington; Sandpoint Light

(Testimony of Ernest C. Willard.)

and Water Company, Sandpoint, Idaho; Pacific Power & Light Company, Portland, Oregon; Hydro Electric Company, Hood River, Oregon; Hood River Gas and Electric Company, Hood River, Oregon; Anacortes Water Company, Anacortes, Washington; Northwest Light and Water Company, Wallace, Idaho; Portland Railway Light and Power Company, Portland, Oregon; Pacific Northwest Traction Company, Seattle, Washington; Puget Sound Traction Light and Power Company, Seattle, Washington.

From July 1916 to October 1917 I was in charge of de- [490] signing and installing a perpetual inventory and cost keeping system for the Puget Sound Traction Light and Power Company, Seattle, Washington.

From October 1917 to July 1918 I was assistant engineer with Henry L. Gray in connection with the valuation of the Portland Gas & Coke Company, Portland, Oregon.

From July 1918 to December 1930 I was manager of cost and stores for G. M. Standifer Construction Corporation, Vancouver, Washington. This corporation had construction contracts for approximately \$38,000,000 of cargo ships and tankers. I was in charge of all inspection, traffic, and handling in connection with all raw materials, stores, and supplies, preparation of all estimates and cost accounting.

From December 1920 to January 1921 I was with Henry L. Gray in charge of the valuation of gas properties of the Puget Sound Power and Light

(Testimony of Ernest C. Willard.)

Company at Bellingham, Washintgon and the street railway properties of Puget Sound International Railway and Power Company, Everett, Washington.

Since January 1921 I have been in consulting practice here in Portland. Among other engagements may be mentioned: Investigation of the Pacific Telephone and Telegraph Company for the City of Portland.

Investigation of the Bureau of Water Works for the City of Portland involving valuations, rate studies, installation of the present accounting system and recommendations in re- [491] gard to future construction, operating, accounting, and financial policies.

Investigation and valuation of the properties of the Oregon and Washington Telephone Company, Sunnyside Telephone Company and others in connection with purchases of the properties and bond issues.

Valuation and investigation of the Salem Light & Water Company, Salem, Oregon, for the purpose of purchase.

Valuation and investigation of the Hoquiam Water Company, Hoquiam, Washington in connection with condemnation proceedings.

Dalles Water Company, Dalles, Oregon in connection with the sale of that property.

Portland Gas & Coke Company in connection with valuation, improvement program, rates, utilization of natural gas, etc.

(Testimony of Ernest C. Willard.)

Edward Hines Lumber Company, Burns, Oregon including design and estimated cost of proposed light and power development, power contracts, etc.

Portland Chamber of Commerce, Industrial Reports, Comprehensive Studies of Power Rates, etc.

Northwestern Electric Company valuation of all properties owned in Oregon and Washington.

Pacific Power & Light Company valuation of Properties.

Portland Gas & Coke Company valuation of all properties in Oregon and Washington. [492]

Peoples Water and Gas Company, valuation of water system in Vancouver, Washington for purpose of determining purchase price and also member of the Arbitration Board.

Peoples Water and Gas Company, valuation of water systems in Hillsboro, Marshfield, North Bend, Oregon.

Washington Gas and Electric Company, Consulting Engineer in condemnation proceedings in the Federal Court.

Pacific Power & Light Company in charge of preparation of basic data for determination of the original cost of the entire property.

In addition to these engagements, I also have been retained by financial companies in connection with the determination of the feasibility of water supply projects, power and light projects, etc., for the purpose of financing.

Q. I take it from that, then, that your experience has covered a period of some 35 years of active

(Testimony of Ernest C. Willard.)

contacts with public utility properties of all kinds and knowledge of the methods of their construction and the costs entering into such construction?

A. It has.

Q. And has your experience also embraced the conditions under which public utility properties are maintained and the manner in which portions thereof from time to time would be retired, for one cause or other? A. It has. [493]

Q. What is the approximate aggregate value of the public utility properties which have been appraised by you or under your supervision?

A. Something over \$500,000,000.

Q. And during the period of your residence here in Portland where you have been practicing as a consulting engineer for the past 20 years, have you been familiar with the properties of Pacific Power & Light Company? A. I have.

Q. Mr. Willard, have you made a study of the properties and business of the Pacific Power & Light Company as of any particular date?

A. I have.

Q. As of what date have you made that determination?

A. As of December 31, 1940.

Q. Will you please state what, in your opinion, is the cost of reproduction new, and the cost of reproduction new, less depreciation of the properties of the Pacific Power & Light Company as of December 31, 1940?

Mr. Slaff: Mr. Examiner, at this time I should

(Testimony of Ernest C. Willard.)

like to object to that question and to any further evidence along that line. I don't think, Mr. Examiner, that I need to state that the evidence is immaterial and irrelevant, and I don't think that there need be any exposition of my views on that subject, because I know that all of the counsel are familiar [494] with that, and the Examiner is familiar with that; I think all of us know what everybody else thinks of the value of evidence of fair value of properties as of the present time in a proceeding of this nature.

Trial Examiner: Mr. Laing, the date was December 31, 1940?

Mr. Laing: That is right.

Trial Examiner: What is the relevancy of that, Mr. Laing?

Mr. Laing: The relevancy of the proposed testimony, so far as the Company is concerned, has to do with elements of value that are represented by the balance sheet, showing the assets and liabilities of the Company at the present time; and if the matter of disposition of any of the so-called acquisition adjustment costs is to be considered, we maintain that the value of the Company's property is vitally material to the consideration of that matter, and the evidence is offered with definite relation to that particular point.

Trial Examiner: Is the evidence that you propose to offer through Mr. Willard, Mr. Laing,—does it go back to any of the estimates that have been made in your original cost study?

(Testimony of Ernest C. Willard.)

Mr. Laing: It has no relation to those estimates or determinations whatsoever, except in the sense that it relates to the same property. I mean, it does not undertake to have any definite relation to the original costs or purchase [495] costs, or any other kind of costs; it is a straight presentation of the value of this property as of December 31, 1940, which is the nearest year-end date we have preceding the hearing on this issue, and it is offered in that relation for its bearing on the issue of what disposition, if any, may be considered with respect to any of the adjustment costs.

Trial Examiner: That is the sole purpose of the offer?

Mr. Laing: That is the sole purpose of the offer.

Mr. Foley: I know that all the lawyers present have a complete legal argument,—have a knowledge of the complete legal argument that the utilities advance in connection with the offer of a present fair value, or reproduction value, reproduction less depreciation, and I think the Examiner is fairly familiar with that argument. He sat in the Northwestern case. But as a statement of record, I would like to have the position of the American Power & Light Company on the record, and I will ask my associate to read that statement, as my eyes are very bad.

Mr. Powell: On behalf of the American Power & Light Company, we urge that the testimony offered as to the Company's present cost of reproduction new and of reproduction new less depreciation is

(Testimony of Ernest C. Willard.)

material and relevant evidence in this proceeding, as indicating one of the important criteria of the value of the property of Pacific Power & Light Company inherent in the property of that Company, and therefore ac- [496] cruing to the common stock of the Pacific Power & Light Company, which the American Power & Light Company acquired and now owns. We further urge that the consideration by the Commission of any issue as to disposition of amounts which may be established in Accounts 100.5 or 107 will, if such evidence is not admitted, unlawfully and unconstitutionally prejudice Intervener's rights as stockholder and creditor of Pacific Power & Light Company.

Trial Examiner: The Examiner is not inclined to view the offer of counsel as having any bearing whatsoever on any of the issues that are to be considered here. This proceeding is a proceeding for the determination of original cost of these properties. The fair value, as the Examiner finds the issues, has no bearing at all in the proceeding, and the Examiner, therefore, is inclined to sustain the objection of Commission's counsel to the offer made by Respondents and by the Intervener, American Power & Light.

How long, Mr. Laing, is the statement of Mr. Willard?

Mr. Laing: The offer of proof which I wish to make?

Trial Examiner: Yes. I want to afford you an opportunity to make your record.

(Testimony of Ernest C. Willard.)

Mr. Laing: It will take me about three minutes to read my offer of proof.

Trial Examiner: Very well.

Mr. Laing: I understand, Mr. Examiner, that the objec- [497] tion to Mr. Willard's testimony has been sustained, and Mr. Willard might as well relax or leave the stand.

Trial Examiner: That is correct.

Mr. Laing: I wish to state, Mr. Examiner, that if we were permitted to, we would expect to prove by Mr. Willard, and I now propose and offer to prove by Mr. Willard, that he is thoroughly familiar, by reason of his detailed studies and examinations, with the physical properties of the Company, and with the Company's plant accounts and records; that he has determined the cost of reproduction of all of the property of the Pacific Power & Light Company used and useful in the generation, transmission, and distribution of electric power and energy and in the rendering of water service and steam heat service, including non-utility property, such as the Public Service Building, and Fruitvale Canal and other property, as of December 31, 1940; that such cost of reproduction would be not less than \$37,450,000.00, not including any allowance for going concern value; that such cost of reproduction, less accrued depreciation, would be not less than \$31,750,000.00 as of said date, also without allowance for going value; and that the cost of reproduction new, less accrued depreciation, including a reasonable allowance for,

(Testimony of Ernest C. Willard.)

or recognition of, going concern value would be not less than \$34,750,000.00; that the present level of prices of labor, apparatus, and material which enter into the construction of [498] electric, water, and steam heat utility properties is not lower, but, if anything, is higher at this time than the level of such prices prevailing on December 31, 1940; that Mr. Willard has made detailed studies of the depreciation existing in the property of the Company and such studies have included (a) field examinations of such properties by Mr. Willard himself; (b) studies of the age and expected life of various classes of property based upon the Company's records and other reliable sources; (c) consideration of deferred maintenance with respect to various items of property; (d) analysis of expenditures made for replacement and maintenance for the purpose of determining the extent to which depreciation had been compensated by such expenditures; and (e) surveys of the entire property to determine the extent of the obsolescence and inadequacy therein if any; and that finally, we are prepared to proceed with the presentation of the studies, methods, and findings used by Mr. Willard in developing the reproduction cost of the property as of the date indicated, and that a specific and detailed offer of proof would necessarily be as voluminous as would be the testimony of Mr. Willard himself.

That offer, I take it, is rejected, Mr. Examiner.

(Testimony of Ernest C. Willard.)

Trial Examiner: That is correct, Mr. Laing, for the reasons the Examiner has already stated.

Mr. Laing: That finishes our direct testimony, Mr. Examiner. [499]

Trial Examiner: Do you have some direct testimony to offer, Mr. Foley?

Mr. Foley: I don't expect to have any direct testimony, subject to the disposition, however, of the Priest Rapids testimony.

Trial Examiner: I did not understand you, Mr. Foley.

Mr. Foley: I say, subject to the disposition you make of the Priest Rapids testimony, I would like to reserve the right, depending upon how you dispose of that, to introduce evidence along that line.

[500]

WILL T. NEILL

called as a witness on behalf of the Pacific Power & Light Company, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination

By Mr. Slaff:

Q. Mr. Neill, you had discussed, both in your testimony at the resumed hearing and during the course of your testimony at the first hearing held last year, the work of your staff in connection with the reclassification study which you originally filed and which is now Exhibit 15 in this proceeding, and the revised study, which is now Exhibit 17 in this

(Testimony of Will T. Neill.)

proceeding. I should like to discuss with you for a brief while the other side of the picture.

The Federal Power Commission examiners came here in connection with the original study, which is Exhibit 15, in the early part of July, 1940, did they not? [505]

A. I don't know the exact date, but it was a short time after our first filing.

Q. And the chief examiner in charge of the Commission's work at that time was Mr. O'Neil?

A. That is correct.

Q. You had known Mr. O'Neil before, when he was here in connection with his work on the Northwestern Electric Company reclassification; is that not so?

A. That is right.

Q. And as I recollect, Mr. O'Neil was here until about September of 1940 with his staff and then was succeeded by Mr. Flynn; is that right?

A. That is correct. I don't know the exact date, but Mr. Flynn succeeded Mr. O'Neil.

Q. And Mr. Flynn remained in charge of the work here on behalf of the Federal Power Commission until the field work was completed sometime in the early part of 1941, as I recall; is that correct?

A. That is correct.

Q. Now, in charge of the entire work, of course, was Mr. Van Scoyoc; that is correct, is it not?

A. I understand that Mr. Van Scoyoc has charge of this particular kind of work.

Q. You have, as a matter of fact, had discussions

(Testimony of Will T. Neill.)

with Mr. Van Scoyoc about various phases of the work from [506] time to time. A. I have.

Q. And, of course, in the regular routine of the work that was done by the staff here in the field under the direct charge of Mr. O'Neil and Mr. Flynn, you had occasion to have very regular discussions from time to time with Messrs. O'Neil and Flynn in connection with their phases of the work?

A. Yes. I had discussions with them, and also some of my staff had discussions with them.

Q. And I take it that they discussed with you the problems as they saw them in checking your studies equally as frankly as you discussed your problems with them? A. I believe so, yes.

Q. In other words, the action by the staff in checking your studies, as far as you have been able to observe, was not certainly any arbitrary action, was it? A. Oh, I think not.

Q. Although they may have differed with you on specific matters, specific problems, that came up from time to time, those differences, you would say, were reasonable differences arising from varying interpretations of the system of accounts; is that right?

A. That is right; varying interpretation of the system of accounts and probably varying opinions as to how to handle some of the details. Of course, there are always differences [507] of opinion there; but they were very cooperative in an endeavor to work out this base study, which we accomplished,

(Testimony of Will T. Neill.)

finally, on almost complete agreement on the original costs.

Q. The attempt on their part, as well as on yours, as you view it, was an endeavor to bring about by your company, in a final study which it might file with the Commission, the maximum degree of compliance with the system of accounts?

A. That is correct.

Q. And the study which you have filed now,—the revised study, Exhibit 17,—reflects, does it not, the changes which have come about in your interpretation of the system of accounts, and perhaps one might even say approach to certain portions of the system of accounts?

A. I think that is correct.

Q. Would it be a fair statement to say that today, as a result of the studies you have made, which culminated in the filing of your Exhibit 17 in this proceeding, the books of the Company, or the balance sheet of the Company as of 12/31/36, was more informative than it was before you began the reclassification of accounts pursuant to the Federal Power Commission's System of Accounts?

A. I don't think I understand that question with respect to the books and the balance sheet being more informative. Are you referring now to Exhibit 17?

Q. Yes. Take your balance sheet as shown in Exhibit [508] 17, Statement G, I believe it is: That is a more informative balance sheet, is it not, than the balance sheet that you had at 12/31/36,

(Testimony of Will T. Neill.)

before you started reclassification; is that not a fair statement?

A. With respect to the new system of accounts, the balance sheet in Exhibit 17, of course, shows the reclassification of property, and in that extent, of course, tied in with the reclassification of property, it certainly is more informative than the balance sheet of December 31, '36, prior to reclassification, if that is the point that you were making.

Q. Well, not quite. I appreciate your answer, but that is not quite the point I have in mind, Mr. Neill. Let me, perhaps, put it somewhat differently: A person seeking information from your balance sheet today can get a better picture of the facts in back of the balance sheet than he could at 12/31/36, before you began reclassification, from looking at your balance sheet as it then existed? Isn't that a reasonably fair statement?

A. To the extent that the new balance sheet, based on the reclassification, divided certain items up into subdivisions; that is correct. And I might add to that, there is another item, also, to the extent to which it is out as discount and expense, there is a greater subdivision of the things that were on the balance sheet before. [509]

Q. As a matter of fact, I should judge, and will you tell me whether it is so, that today you,—when I say “you” I mean the Company—know more about those property accounts than you did before you began reclassification studies?

A. Absolutely.

(Testimony of Will T. Neill.)

Q. And to that extent the reclassification studies which you have made have been helpful to the Company itself?

A. No doubt about it.

Q. And that applies equally, does it not, to the security holders of your Company and to the regulatory agencies which have duties in connection with your Company and to potential investors of securities of your Company?

A. I think that is probably true, taken in connection with the new regulations under which we are working, and altogether there is more information available as a result of these studies; there is no doubt about that.

Q. Now, looking at the Uniform System of Accounts of the Commission as a whole, would you say that that system is arbitrary or outrageous?

A. Well, it is a sort of a new device; it contains some things that we do not agree with, of course; we all do not agree upon it.

Q. I want you to assume or accept as a fundamental premise that there might be differences in the way you would approach the problem as compared with anyone else, of course. [510]

A. Personally I would not use the term "outrageous", although I might not agree with some of the things in the reclassification.

Q. Let us look at the term "arbitrary". Would you call the Uniform System of Accounts an arbitrary requirement of the Commission?

A. Well, there are certain aspects of the classification with respect to recorded costs as costs to

(Testimony of Will T. Neill.)

the persons who originally dedicated the property to public service which are new and unusual; some of those things, at times, would appear to me to be somewhat arbitrary. Of course, as a general rule, we have the classification and we are trying to conform to it.

Q. Had you completed your sentence?

A. Yes, I believe so.

Q. Let us look for a minute at this position with respect to recording costs to the persons first devoting the property to utility service. You recognize, do you not, Mr. Neill, looking at the history of the utility industry, the reasonable necessity for such a requirement?

A. Well, I can see some necessity for getting more information as to the history of such transactions. Does that answer your question?

Q. Without going into the whole panorama of the Federal Trade Commission investigation, I think you will [511] agree with me, will you not, that this investigation disclosed a broad area of abuse that had existed in the utility industry?

A. Well, as to that I can only say,—I am not admitting there was a general abuse throughout the industry,—I do think that the reclassification probably is, or will clear up some of those things that were disclosed in the Federal Trade Commission investigation. Everything is out in the open where everybody can see it.

Q. And where it ought to be; isn't that so?

(Testimony of Will T. Neill.)

A. I think so, yes.

Q. And one of those things that ought to be out in the open where everyone can see it is whether or not the cost of the public utility to the person first devoting it to the service of the public is disclosed; rather, it is one of those things,—

A. (interposing) At least, I can see there can be no harm in disclosing that; it might be beneficial.

Q. And that requirement of the System of Accounts from your point of view, is perhaps one of the most onerous requirements of the whole system?

A. Well, as I said before, it was rather unusual and, we thought, perhaps it was a little bit arbitrary; but, on the other hand, so far as developing that information is concerned, as I said, it can do no harm, and perhaps can do some benefit; it caused us a great deal of work and we spent a great deal of [512] money getting a start on it.

Q. The reason I put the last question just the way I did is because I don't want to discuss with you all the various requirements, and I thought if we could agree, from your point of view, that this requirement of studying cost and cost to the person first devoting it to the public use was one of the most difficult and burdensome in the system, and we could agree that that was not an arbitrary requirement, but one that had reasonable common sense back of it, then we would not have to go through the rest of the requirements one by one. Now, is it a fair statement, Mr. Neill, that from your point

(Testimony of Will T. Neill.)

of view, that is perhaps one of the most difficult of the whole system?

A. Yes; that was, to get the thing reclassified on that basis. May I add to that?

Q. Surely.

A. That probably was not the most difficult so far as getting reclassification—just strike the last part of the answer. I will let it stand at that.

Q. Now, looking again at the System of Accounts broadly, you would not say that that system was entirely at odds with the correct principles of accounting, would you?

A. I don't think I can answer that question; I don't profess to be an expert accountant, and I don't feel qualified to answer that.

Q. You are a pretty good working one? [513]

A. Well, but I am not familiar with all the accounting theory. I am not sufficiently qualified to take up the principles of accounting; that is a little beyond my scope.

Q. But from the point of view of an operating man who has to have a good familiarity with basic principles of accounting to know whether he is running his business soundly or not, would you say that the System of Accounts was at odds with the correct principles of accounting, as you know them?

A. Within the limits and needs of the man who is handling the accounts and analyzing the accounts, I should say that the system is workable. There are a few things in it that could be improved, from my point of view.

(Testimony of Will T. Neill.)

Q. And to complete the answer, if I may suggest it, the system, from your point of view, is not at odds with the principles of accounting, as you know them?

A. Well, the principles of accounting as applied to the problems that the operating people have to deal with, it certainly is not at odds; it is workable; and, fundamentally, as to that part of the reclassification which those men have to deal with, it is not very much different from what we had before.

Q. It is certainly not the expression of a whim on the part of the Commission, but rather the exercise of its judgment?

A. Well, if I can limit my answer to exclude the [514] general principles of accounting—since I don't profess to be an accountant and could not pass on that—and limiting my answer to the ordinary use of the classification for the ordinary operating properties with which I am familiar, it is not at odds with those principles. [515]

Q. For example, going into another phase of this general problem, you testified that from time to time you and the staff had differences of opinion,—differences of interpretation. As I understand it, one of the remaining differences of interpretation between you and the staff members is whether the difference between the amount paid in 1910 by American for the properties acquired and the amount established on the books of the Pacific on those properties when they came over to the Pacific, should be established in Account 100.5 or Account 107;

(Testimony of Will T. Neill.)

that is one of the remaining differences of opinion between you and the members of the staff, is it not?

A. I believe that is one of the principal remaining differences.

Q. Now, let me ask you, Mr. Neill, whether, in your own judgment, such a difference is not a reasonable difference of opinion that reasonable men, looking at the problem, can have?

A. I think so, yes.

Q. That is to say, the staff, when they look at the system of accounts and say that difference between cost to American and the amount established on the Pacific books, that difference ought to go into Account 107 instead of 100.5 they are not being just high-handed or arbitrary, but rather giving an expression to what they consider to be a reasonable interpretation of the System of Accounts, from their point of [516] view? Would you say that is a fair statement?

A. I would say that is true.

Q. Now, originally when you filed your first report of your study, which is now marked as Exhibit 15, you stated that you could not determine the original cost in the acquisition adjustments, acquisition by acquisition; is that correct?

A. Yes. I think I testified that when we filed the statement we had not been able to formulate a method to determine the original cost of the several acquisitions, at the time of acquisition, with what we thought would be sufficient accuracy; we had determined the original cost as of December 31, 1936, with what we considered was a rather high degree

(Testimony of Will T. Neill.)

of accuracy; that is, the original cost of the property as it existed in December, 1936. Our difficulty was in formulating some method for determining the original costs at the time of acquisition, for the several acquisitions, which could be tied into the more accurate determination as of December 31, 1936.

Q. Was that, in part, due to the fact that your records as to the original costs of the properties, acquisition by acquisition, were incomplete, in many cases?

A. It was due to the fact that the records of the predecessor companies were incomplete, and also to the fact that the records of the properties,—such records that were available of the properties,—on the books of the Pacific Company were incomplete; that is, we didn't know what the [517] cost of the property was at the time of acquisition, in many cases, and it did not seem possible to get the original cost at the time of acquisition so that we could verify the original cost, acquisition by acquisition.

Q. Subsequently during the ensuing years, you continued your study to determine the original costs, acquisition by acquisition, and did ultimately determine that cost, and that cost is reflected in Exhibit 17?

A. Yes.

Q. Have you anything to add?

A. Yes. Prior to the filing of Exhibit 15, July 3, 1940, of course we had done some work on determining original costs. After filing the exhibit, we took the work up anew and carried it to completion, and it is shown in Exhibit 17, our Revised Statement.

(Testimony of Will T. Neill.)

Q. So far as you are concerned, the job which you have now done and the determination which you have now made with respect to original costs, acquisition by acquisition, is a sound job and a satisfactory determination?

A. I think the job is sound. Of course, in determining original cost at the time of acquisition, as shown in Exhibit 17, we had to use what records were available from the best information we could get; and I would say that the revised costs, estimated as of the time of acquisition, are the best that we can do; I couldn't swear they are absolutely correct; but, using those, and tying them in, as we can, to the more accurately determined original cost of the properties as they existed December 31, 1936, in my opinion, it makes a pretty good job of it. [519]

By Mr. Slaff:

Q. As far as you know, are your records in any better shape, generally, with respect to acquisitions than sister companies—other companies in the Bond and Share System—with which you may be familiar?

A. I am not familiar with any of the other companies; so I would not care to say—I really can't say. I don't know anything about the records of the other companies; so I really can't say whether they are or are not.

Q. But, anyway, then to sum up that particular phase of your work, you had a tough job on your hands from several points of view, including the incompleteness of the record; but you went ahead

(Testimony of Will T. Neill.)

and did it and arrived at what you feel to be a reasonably satisfactory answer; is that not so?

A. Yes, I think so. The reason that we have a satisfactory answer, of course, has come out of the method which we followed in determining the original cost of the property as it existed on December 31, 1936 on what I considered to be the most accurate way of determining that—that is, on the basis of pricing out the inventory. Having that, the inaccuracies that may appear in our determination of the original cost at time of acquisition, can be washed out through the reconciling adjustment that we discuss on page 47 of Exhibit 17; but in my opinion, the job is a satisfactory one. [520]

Q. Now, turning to another phase of the problem, Mr. Neill, is it a fair statement that at July, 1910, at the time of the transfer of the original acquisitions from American to Pacific, that Pacific was merely an incorporated department of American?

A. Well, I would not say that it was an incorporated department. The American Power & Light Company created Pacific, of course. I don't think you would call it an incorporated department; it was a separate company.

Q. Well, are Inland and Pacific separate companies?

A. Well, Inland and Pacific are separate corporations, yes.

Q. And Inland, in your view, is merely an incorporated department of the Pacific; is not that right?

(Testimony of Will T. Neill.)

A. Inland Company is operating, I think I have testified before, as really in effect a separate department of Pacific.

Q. Sure, and that is the reason why I have used the term an incorporated department, Mr. Neill, because you used that term to characterize the relationship between Inland and Pacific in your testimony before the Federal Power Commission; that is to say, you referred to Inland as an incorporated department of Pacific. You recollect that, do you not?

A. Oh, yes, that is right.

Q. Now, I am confining myself now, and I think I did [521] in the question I first put to you in this regard, to the time at July, 1910, at the time of the transfer of the properties to Pacific, and I ask you whether it is not a fair statement to say that at that time Pacific was nothing more than an incorporated department of American?

A. I don't think I can answer as well on that question as I can on the Inland situation. All that I knew about the 1910 situation is that the American Company, as I said before, created Pacific, and American—that is, after having assembled certain properties for operation by Pacific, Pacific Power & Light Company purchased those properties from American and began its career as a separate company. So far as I am familiar with the Pacific operations since I have been connected with the organization, there isn't the same situation as between Pacific and American as there is between Pacific and Inland, whose properties are more or less tied to-

(Testimony of Will T. Neill.)

gether; and, as a matter of ordinary operating convenience, are operated more or less as one institution.

Q. Well, that, Mr. Neill, is why, as I have said, I confined this question, in the first instance, to the period just at July, 1910, when American caused the transfer of the properties to Pacific, and I want subsequently to discuss with you the relationship that has existed after that time; but just confining ourselves to the time of transfer, would it be fair, again—would it be fair to characterize [522] Pacific at that time as an incorporated department of American?

A. I don't look at it in that light, as an incorporated department any more than in all normal cases where the controlling stockholder—that is, if there is a controlling stockholder in a corporation, such as there is in American and Pacific.

Q. Well, at the time of transfer of the properties to Pacific, all the securities of Pacific went over to American, did they not?

A. That is correct. The Pacific purchased the properties which it obtained in the 1910 acquisition from American, and gave in return certain securities.

Q. At the time of creation of the Pacific and transfer of the properties to Pacific in 1910, no one, other than American, had any form of interest in Pacific; isn't that right?

A. I believe that is right.

Trial Examiner: Was American an operating company at that time, Mr. Neill?

(Testimony of Will T. Neill.)

The Witness: I don't know. I think American was an operating company; but I can't say.

Mr. Laing: I don't think, Mr. Examiner, that American was ever an operating utility company. My recollection is that American's operations were exclusively through subsidiaries in one form or another.

Mr. Slaff: Well, there seems to be some difference [523] with respect to that, but we can resolve that and determine that, and I think we will arrange to have some mention of that fact in the record, Mr. Examiner, at some other time.

By Mr. Slaff:

Q. Now, subsequently, American disposed of the securities, other than the common stock, isn't that right? A. Yes, I believe so.

Q. American, however, retained all their common stock, except directors qualifying shares?

A. That is correct.

Q. And has so retained all the common stock down to date; is that right? A. That is correct.

Q. Now, since the inception of Pacific, American has continued to control Pacific; is that right?

A. They have always owned the stock control.

Q. Well, is it a fact that, speaking broadly,—and if you don't want to, you can narrow it down as you just have—speaking broadly, Pacific has, since 1910, controlled—American has, since 1910, controlled Pacific?

A. I think the stock control, which they have had,

(Testimony of Will T. Neill.)

gives them control. I didn't mean to—I thought my first answer was sufficient. [524]

Q. Is it a fact that no determination of major policy is made by Pacific without the acquiescence of American?

A. Well, so far as my experience has gone,—I have been with the Company since 1921,—and the policies of Pacific, as far as I know, have been formulated locally by the Company's officers.

Q. Of course, assuming that to be so, those formulations are subject, and always have been subject, to approval by American?

A. Well, not to my knowledge. As I say, as far as my experience with the Company has been, the officers of the Company have formulated the policies governing the Company's operations and activities. As far as I know, there has been no formulation of those policies by American within my knowledge.

Q. Now, let's go back, then, to the very inception of the Company. Who comprised the first Board of Directors of Pacific, do you know?

A. All that I know about the first Board of Directors is the record contained in the minutes of a meeting of July 23, I believe, appearing in the record as Exhibit 20.

Q. Well, just so that the record can be technically accurate on that point, the directors set out in the minutes of meeting of July 23, 1910, comprised the second Board of Directors of Pacific, did they not?

[525]

(Testimony of Will T. Neill.)

A. I believe that is correct.

Q. The first Board was comprised, was it not, of fifteen named dummies up in the state, without any invidious connotations, were dummies at the time of the incorporation?

A. I saw a list of the first Board of Directors at one time. Of course, I do not know who the men were. There was a Board of Directors, I suppose, the first one at the time of the organization of the Company; but I have no idea of who the men were or where they were from or with whom they were associated.

Q. Now, this second Board, whose names appear in Exhibit No. 20, do you know who they were?

A. I don't know the men. I understand, however, that that second Board largely was composed of staff members or officers of American Company, or Electric Bond & Share.

Q. Or members or employees of the firm of Simpson, Thatcher & Bartlett?

A. I believe so.

Q. For the purposes of the record, Simpson, Thatcher & Bartlett were counsel for Electric Bond & Share and American, were they not?

A. I believe so.

Q. Now, I call your attention, Mr. Neill, to a copy of a letter under date of July 23, 1910, and ask you whether or not this is a copy of a letter in the files of the Pacific [526] Power & Light Company (counsel handing a paper to the witness).

Mr. Laing: Mr. Slaff, I have not seen the letter before, but if someone says they found it in the files,

(Testimony of Will T. Neill.)

I am willing to concede that it may have been taken from the files.

Mr. Slaff: Oh, sure. If Mr. Neill does not recognize it now, I want him to check it.

The Witness:: I have never seen this letter. It may have come from the files. I have never seen it, or a copy of it.

Mr. Slaff: I should like to have a copy of this document, Mr. Examiner, marked for identification with the next exhibit number.

Trial Examiner: It will be marked for identification as Exhibit No. 22.

(The Document Referred to Was Marked Exhibit No. 22 for Identification.)

By Mr. Slaff:

Q. July 23, 1910, Mr. Neill, was the date of the Board meeting, the minutes of which are contained in Exhibit No. 20; is that right?

A. That is correct.

Q. Who was Mr. Guy W. Talbot, at this time?

A. He appears in this letter as a man who had been elected to the vice-presidency of the Pacific Power & Light Company.

Q. Can you give us a little more information about [527] Mr. Talbot?

A. You said at that time. Mr. Talbot was, until, oh, perhaps,—I have forgot just the year,—six or seven years ago, or maybe a little less, was president of the Pacific Power & Light Company.

Q. Who was the first president of the Pacific Power & Light Company; do you know?

(Testimony of Will T. Neill.)

A. No, I do not.

Q. You can check that, I take it, for us.

Mr. Laing: We will concede, Mr. Slaff, that Mr. Talbot was president of the Pacific Power & Light Company from at least the 1st of August, 1910, down to February of 1933, when he resigned.

Mr. Slaff: That was my impression, Mr. Laing, only I had simply assumed that he had been elected president right at the outset, and I discovered——

Mr. Laing: I think within a week after the date of this letter, he was president of the Company, I am quite sure.

Mr. Slaff: All right.

By Mr. Slaff:

Q. Now, who was Mr. S. Z. Mitchell?

A. Apparently, from this letter, he was Chairman of the Board of the American Power & Light Company.

Q. You don't have any doubts about that, do you?

A. No, I don't know what,—this is the only know- [528] ledge I have of what his position was at that time, because otherwise I don't know. I assume because he signed himself on here as Chairman of the Board, that he probably was Chairman of the Board of the American Power & Light Company.

Q. What was Mr. Mitchell's connection with Electric Bond & Share Company?

A. I can't say of my own knowledge. He undoubtedly probably was an officer, or he may have been president; but I don't know.

(Testimony of Will T. Neill.)

Q. You have certain knowledge, don't you, Mr. Neill, which you acquired in the course of your studies as to the positions or relationship of a man like Mr. Mitchell, to assist you?

A. Well, I have known of Mr. Mitchell, of course, for a good many years; but I can't say exactly what his relationship was to Electric Bond & Share, or American Power & Light Company, as to the position which he held.

Mr. Laing: We are willing to concede, Mr. Slaff, that Mr. Mitchell was the leading factor, whatever office he held, in the Electric Bond & Share Company at that time.

Mr. Slaff: Well, that, essentially, is all I was interested in.

By Mr. Slaff:

Q. And Electric Bond & Share was the parent of the American Power & Light Company; isn't that right? [529]

A. I don't think I can answer that question, because of lack of knowledge, as to the exact relationship between American and Electric Bond & Share.

Q. Well, Mr. Neill, you have investigated that relationship in the course of your preparation of your original costs and reclassification, have you not?

A. Not the relationship between Electric Bond & Share and American.

Q. Well, did it interest you at all, in the studies that you made, to determine whether there was any

(Testimony of Will T. Neill.)

affiliated relationship between those two companies?

A. It did not occur to me that it was necessary, to get this reclassification study completed. I made no endeavor to find out what relationship there may have been between American and Electric Bond & Share.

Q. You have been with this system about twenty years, or more, is that right?

A. I have been with this system since 1921, in various capacities.

Q. Prior to that time, you had had regulatory experience, or experience with the regulatory commission here in this state?

A. Yes. I had been about six years in the Public Service Commission of Oregon.

Q. And have you at any time during that time had any [530] doubt that the Electric Bond & Share was the parent of American Power & Light?

A. Well, I have always known that there was an affiliation there. The term "parent," of course, is a little foreign to my vocabulary in that particular connection; but we know now and we have always known,—or, I have known,—that there was an affiliation there, and there still is.

Q. Now, directing your attention to Exhibit 22, in the first paragraph there is a statement that Messrs. Simpson, Thatcher & Bartlett are writing Mr. Weathers fully today regarding the transfer of the various local companies. Who was Mr. Weathers?

Mr. Laing: If Mr. Neill doesn't know, I can

(Testimony of Will T. Neill.)

contribute that information, because I happened to know Mr. Weathers very well. He was a member of the firm of Simpson, Thatcher & Bartlett, and he was out here in Oregon at the time assisting in putting these properties together. He was either a member of the firm, or what they called a clerk in the office of Simpson, Thatcher & Bartlett at that time.

By Mr. Slaff:

Q. Now, with respect to the gentlemen named in the second paragraph in which Mr. Mitchell tells Mr. Talbot who had been elected to certain offices, were they local people here in Oregon whom you knew as operating officers of the Company? [531]

A. Yes. Those were all local people; at least, with the possible exception of Mr. Nevins. I knew Mr. Nevins a long time before his death. Of course, I don't know what his origin was; I can't say, but Mr. Cookingham who was elected as vice-president, and Mr. McArthur, were local men, and I believe Mr. Nevins was; but I can't say for certain.

Q. By the way, is Mr. Talbot still alive?

A. He is.

Q. And Mr. Cookingham?

A. Mr. Cookingham is still alive and is still vice-president of the Company.

Q. And Mr. McArthur? A. Yes, sir.

Q. Mr. Talbot is still a director of the Pacific Company? A. He is.

Q. Now, I would like to have you read into the record at this point the fourth paragraph of that

(Testimony of Will T. Neill.)

letter, beginning towards the bottom of the first page, if you will.

A. A letter at the bottom of page,—or, rather, the paragraph at the bottom of the first page of Exhibit 22 reads as follows: (Reading)

“While we have elected the foregoing as officers in the West we have not as yet elected any Western directors because we want to keep the full Board here until we get through with [532] all the votes relating to the issuance of bonds, stocks, etc. When this is all finished we will elect the permanent Board, a majority of which will be in the West and an Executive Committee the majority of which will be here.”

Do you wish me to read on with the——

Q. No, thank you.

Mr. Slaff: I would like to offer this letter in evidence, Mr. Examiner, and, certainly subject to any check which counsel may later wish to make with respect to the letter.

Mr. Laing: I have no objection to its being offered in evidence.

Trial Examiner: Exhibit 22 will be received.

(Exhibit No. 22 was received in evidence.)

Mr. Laing: Subject to checking it as to accuracy after copying.

Trial Examiner: Yes. That reservation will be made, Mr. Laing.

By Mr. Slaff:

Q. Now, I call your attention, Mr. Neill, to what

(Testimony of Will T. Neill.)

purports to be a copy of a telegram,—night letter,—sent by Mr. F. G. Sykes to Mr. Guy W. Talbot, under date of December 16, 1911 (counsel handing a paper to the witness). Who was Mr. F. G. Sykes at this time; that is, at 1911?

A. Mr. Sykes was, as far as I know, a New York man; I don't know of my own information what position he held. [533]

Q. Would it help refresh your recollection if I tell you that my information is that he was president of American from about 1909 to about 1920?

A. I know he had some connection in New York, probably with American, but I——

Mr. Laing: (Interposing) I think we will concede that statement, Mr. Slaff. I think he was also, for a period of time, a director and probably also an officer of some kind in Pacific Power & Light Company; but I couldn't tell you without checking that. I know he was a director of the Pacific Power & Light Company, and he was president of the American Power & Light Company. [534]

Mr. Slaff: I should like to have this document, which is a night letter—a Western Union night letter—from F. G. Sykes to Guy W. Talbot, Pacific Power & Light Company, dated at New York December 16, 1911, marked for identification.

Trial Examiner: It will be marked for identification as Exhibit 23.

(The document referred to was marked Exhibit No. 23 for identification.)

(Testimony of Will T. Neill.)

By Mr. Slaff:

Q. That telegram deals, does it not, with the proposed increase of the Pacific Power & Light preferred stock and making provision for an issue of second preferred; does it not?

A. I believe so.

Q. Now, looking at that telegram, where would you say the decision to increase the Pacific Power & Light Company preferred and the issuance of a second preferred originated?

A. Well, I don't think I can tell from this telegram. It apparently was, that is, the decision to make the stock changes may have resulted from previous discussions. Whether the plans for the changes originated with Mr. Sykes, I don't think I could presume to say, from this telegram.

Q. But regardless of where the plans may have originated, where did the final determination to increase the preferred stock and issue the second preferred come from? [535]

A. Ordinarily that probably would come from the Board of Directors.

Q. Well now, who told the Board of Directors?

A. I can't say.

Q. In this case—I am quite serious about this, and looking at the telegram—have you read the telegram?

A. I have read the telegram, yes.

Mr. Laing: The telegram is about calling a Directors' meeting.

Mr. Slaff: That is right.

(Testimony of Will T. Neill.)

By Mr. Slaff:

Q. Certainly there is no question about the final act of authorizing the issuance of the securities being done by the Board of Directors. There is no doubt about that, certainly, in my own mind, and I don't think there is in yours?

A. That is right.

Trial Examiner: The Board of Directors of the Pacific?

Mr. Slaff: Yes, the Board of Directors of the Pacific.

By Mr. Slaff:

Q. Now, looking at this thing as a practical matter, can you tell us on this record who decided actually that this preferred stock was to be increased and that there was to be an issue of a second preferred, as between the American and the Pacific? [536]

A. Well, this telegram apparently contains the suggestions of Mr. Sykes to Mr. Talbot to do certain things. Of course, I don't know what the preliminary arrangements or discussions may have been. Frequently, in the later days, or today, these things are discussed before they are finally consummated.

Q. That is why I put to you the question as I did. Leaving aside the preliminary discussion which may have been had, what I am asking you is, as a practical man, where the ultimate decision as to the issuance of this stock was made as between the American and the Pacific.

(Testimony of Will T. Neill.)

A. Well, I am trying to answer your question.

Q. Surely.

A. About all I can say about that is that this telegram contains suggestions or instructions to Mr. Talbot to make certain arrangements. Whether Mr. Sykes made the determination as to what was going to be done, I really am not able to answer, because I don't really know.

Mr. Laing: I suggest that the telegram speaks for itself. It is hardly reasonable to ask the witness to attempt to interpret a message which passed between two people 30 years ago beyond what is expressed on the telegram itself.

Mr. Slaff: Of course, I always find that where a document is supposed to speak for itself, when I come to submit a brief it speaks in one language, and it speaks in another [537] language to counsel. That is quite reasonable to assume. What I am interested in getting into this record is how it speaks to him, because, unfortunately, neither I nor counsel are under oath and, consequently, we may have varied interpretations; and I think I am entitled to pursue with Mr. Neill what this telegram means to him.

Mr. Laing: I do not like to take issue on a relatively unimportant point with counsel, but it strikes me as to what Mr. Neill's opinion of what that message might mean is rather irrelevant and immaterial.

Trial Examiner: I am rather inclined to agree with you, Mr. Laing. Of course, Mr. Slaff, the wit-

(Testimony of Will T. Neill.)

ness can be explored as to knowledge that he has of the situation, but I believe he has testified that he has no knowledge other than what this telegram might indicate to him; and I think perhaps the interpretation of the telegram could probably be entrusted to the Commission. I presume that it is your intention to offer the telegram?

Mr. Slaff: Yes.

Mr. Laing: I have no objection to the telegram being offered in evidence, subject to its being checked for accuracy as to copy.

Mr. Slaff: All right. I have no objection. I will offer this document which has been marked as Exhibit 23 for identification. [538]

Trial Examiner: Very well. Under the reservation that the telegram may be checked for accuracy, Exhibit 23 will be received.

(Exhibit No. 23 received in evidence.)

By Mr. Slaff:

Q. Now, do you know whether the action mentioned in this Exhibit 23 for identification was taken by the Board of the Pacific Power & Light Company? A. I do not.

Q. I call your attention to what purports to be a copy of the minutes of the special meeting of the Board of Directors of the Pacific Power & Light Company held on December 22, 1911, and I ask you whether or not the action set out in the telegram, Exhibit 23, was taken by the Board.

Mr. Slaff: I am sorry I don't have additional copies. That must have been one of your early Board meetings, Mr. Laing?

(Testimony of Will T. Neill.)

Mr. Laing: Well, I was there at the time. Those minutes indicate that Mr. Sykes was a director of the Pacific Power & Light at that time, also.

Trial Examiner: I didn't hear that.

Mr. Laing: I say, those minutes indicate also that Mr. Sykes was a director of the Pacific Power & Light Company at that time.

Mr. Slaff: Well, while we are matching directors, [539] I have just been informed that Mr. Talbot was a director of the American—subject to check, of course. A vice-president, I am advised.

A. The minutes of the Pacific Power & Light Company Board of Directors' meeting indicate that this action was taken, with reference to this matter, on December 22, 1911.

Mr. Slaff: I should like to have the copy of the minutes of the Board of Directors of the Pacific Power & Light Company, held on Friday, December 22, 1911, or, rather, an excerpt from those minutes, being a seven-page document which is taken from those minutes, marked for identification and received in evidence, subject to check by the Company as to the accuracy of that portion of the minutes. I regret I do not have additional copies now, but I will furnish them in a few days.

Trial Examiner: It will be marked for identification as Exhibit 24. Is there any objection to the offer?

Mr. Laing: I have no objection to it. It may be offered in evidence directly, so far as I am concerned.

(Testimony of Will T. Neill.)

Mr. Slaff: Yes. We offer it directly; I would like to have it marked for identification and I will offer it directly in evidence.

Trial Examiner: What is the date?

Mr. Slaff: December 22, 1911.

(The document referred to was marked Exhibit No. 24 and received in evidence.) [540]

Trial Examiner: We will take a short recess.

(Whereupon, a short recess was taken after which proceedings were resumed as follows:)

Trial Examiner: The hearing will be in order.

By Mr. Slaff:

Q. Mr. Neill, Mr. Laing asked me to request you to read into the record at this point the Directors of the Pacific Power & Light Company at that time, and to ask you to identify them if you can, which I am glad to have you do.

A. The list of Directors shown on Exhibit 24 as being present at this meeting, held December 22, 1911, contains the following: Mr. J. C. Ainsworth, a Portland man; C. Hunt Lewis, who, I believe, also was a local man; H. C. Lucas, Yakima, Washington; Edward Cookingham, a Portland man; Philip Buehner, who, I believe, also was a local man; Miles C. Moore, an ex-Governor of the State of Washington, whose home was at Walla Walla, Washington; Guy W. Talbot, a Portland man; S. S. Gordon, who was, as I remember, a banker in Astoria, Oregon; John A. Laing, who is with us today. The minutes also show that the following

(Testimony of Will T. Neill.)

Directors were absent: F. L. Dame, who was a New York man; S. Z. Mitchell, a New York man; Fred S. Fogg, a local man.

Mr. Laing: Mr. Fogg actually lived in Tacoma.

The Witness: I am speaking of locally; as in the northwest, in this territory. [541]

The minutes also show as being absent: William Jones, also a northwest man—I have forgotten just where he lived; F. G. Sykes, a New York man; Josiah Richards, who is at the present time one of our Directors and lives in Spokane, I believe.

By Mr. Slaff:

Q. Now, these people to whom you referred as New York men, were they connected with the American Power & Light Company?

A. I believe so, but I am not certain as to their positions.

Mr. Laing: We will concede that they were so associated, and Mr. Dame, Mr. Mitchell and Mr. Sykes.

By Mr. Slaff:

Q. Who, at this time, comprises the executive committee of the Board of Directors of the Pacific Power & Light Company? A. I don't know.

Q. I will show you what purports to be a copy of the minutes of the meeting of the executive committee of the Pacific Power & Light Company held on December 30, 1911, and ask you whether it appears from there who comprises the executive committee.

A. According to this document, the members of the executive committee who were present at this

(Testimony of Will T. Neill.)

meeting on [542] December 30, 1911, were S. Z. Mitchell, F. G. Sykes, and F. L. Dame.

Q. And where does it appear that that meeting was held?

A. That meeting was held at 71 Broadway, New York. [543]

Q. The address, 71 Broadway, is that where the offices of American and Bond & Share was located?

A. I believe so.

Mr. Slaff: I should like to have that document marked,—a one-page document marked and offered in evidence. I am not interested, Mr. Examiner, in the substance of this particular meeting; but I am offering it merely to show who at that time were the——

Mr. Laing: (Interposing) I think we can save you the bother of encumbering the record with that by admitting that these were three members,—three of the five members of the Executive Committee of the Pacific Power & Light Company's Board of Directors at that time. I can't tell you, for the moment, who the other two were, but I think probably Mr. Talbot and one other man from the West; but I can't remember.

Mr. Slaff: Well, that is thoroughly satisfactory.

Trial Examiner: Very well.

By Mr. Slaff:

Q. And, as a matter of fact, Mr. Neill, as long as the Executive Committee of the Board of Directors of the Pacific Power & Light Company continued in existence, a majority of that Executive

(Testimony of Will T. Neill.)

Committee were so-called New York men, or people back in New York, connected with the American; isn't that right?

A. I am sorry, but I do not know. [544]

Mr. Laing: I can't answer that. We haven't checked that. I really don't know. It seems to me later on there was a change made, but I am not certain about that.

Mr. Slaff: Well, if you will be good enough to check that.

By Mr. Slaff:

Q. I call your attention, Mr. Neill, to the minutes of the regular quarterly meeting of the Board of Directors of the Pacific Power & Light Company held January 14, 1932, which are just about as far as the minutes which I have go, and that indicates, does it not, the five men who were then elected as the Executive Committee of the Board?

A. Yes. This document indicates that at the meeting of the Board of Directors on January 14, 1932 there were nominated and elected as the members of the Executive Committee for the ensuing year: Mr. S. Z. Mitchell, Guy W. Talbot, J. C. Ainsworth, A. S. Grenier, and Frank Silliman, *Mr.*

Q. And of those five men, Messrs. Mitchell, Silliman, and Grenier were American Power & Light people in New York; isn't that so?

A. They were New York people, and I assume they were connected with the American.

Mr. Laing: Either American or Bond & Share. I am not certain about Mr. Grenier being with the American Power & Light Company. [545]

(Testimony of Will T. Neill.)

Mr. Slaff: Mr. Examiner, before proceeding on, might I ask that there be, for convenience, copied into the record, Exhibit 22 and Exhibit 23. Exhibit 22 is the letter of July 23, 1910, an Exhibit which we discussed before the recess, and Exhibit 23 is the telegram of December 16, 1911, which we have been discussing more recently.

Mr. Laing: I have no objection to that.

Trial Examiner: Of course, that cannot be done, Mr. Slaff, inasmuch as we have given those documents an exhibit number. For that reason, it will be necessary that the copies be furnished before the exhibit is filed.

Mr. Slaff: Oh, yes. I don't want to make any changes to their status as exhibits.

Trial Examiner: Very well.

“File 53-B
P.P.&L.Co.—
Organization

“American Power & Light Company
71 Broadway
New York

July 23rd, 1910.

“Guy W. Talbot, Esq.,
Lewis Building,
Portland, Oregon.

Dear Mr. Talbot: [546]

“Messrs Simpson, Thatcher & Bartlett are writing Mr. Weathers fully today regarding the transfer of the various local companies.

(Testimony of Will T. Neill.)

“At a meeting of the Pacific Power & Light Directors here today the following Western officers were elected:

“Guy W. Talbot, Vice-President
Edward Cookingham, “
George F. Nevins, Assistant Treasurer
George F. Nevins, Secretary
L. A. McArthur, Assistant Treasurer
L. A. McArthur, “ Secretary

“We did not elect Mr. Nevins Treasurer because under the laws of the State of Maine the stock certificates must be signed by the Treasurer or the Cashier. Inasmuch as the stock certificates will probably be signed here for the present at least we want to have the Treasurer here, as we do not like to have stock certificates sent out signed ‘Cashier’ as this is more or less unusual and for that reason may cause Comment.

“While we have elected the foregoing as officers in the West we have not as yet elected any Western directors because we want to keep the full Board here until we get through with all the votes relating to the issuance of bonds, stocks, etc. When this is all finished we will elect the permanent Board, a majority of which will be in the West and [547] an Executive Committee the majority of which will be here.

“I have your letter of the 15th as to the signing of checks by the local managers. I have discussed this with Mr. Sykes and he suggests that all the checks be signed at the Portland office ex-

(Testimony of Will T. Neill.)

cept for petty disbursements in the various towns where we do business and that for such petty disbursements each local manager should have a contingent fund against which checks can be drawn by the local cashier and countersigned by the local manager; statement to be made up weekly or monthly as you may desire for such petty disbursements, such statement to be sent to the Portland office and audited there and check for such disbursements as are approved by your office to be forthwith sent to the local manager to reimburse his contingent fund as aforesaid. The amount of such contingent fund you will of course fix to meet the requirements in each case, except in the local offices where considerable freight bills are to be paid and large construction items are to be met a small contingent fund of from say a few hundred dollars up to say one thousand dollars as a maximum should be sufficient, especially in view of the fact that these people can make up a statement every three or four days and send it in to your office if it becomes necessary to quickly replenish the contingent fund.

“I enclose herewith a number of certified copies of resolutions authorizing the signing of checks by the above [548] named officers, to withdraw the funds of the company from the various local depositories.

Very truly yours,

(Signed) S. Z. MITCHELL

Chairman of the Board

SZM/CMH”

(Testimony of Will T. Neill.)

“Western Union Telegraph Company
Night Letter
84 N. Y. SF. 141 N. L.

New York, N. Y. Dec. 16, 1911.

“Guy W. Talbot
Pacific Power & Light Co., Spalding Bldg.,
Portland, Oregon.

“Desire to increase Pacific Power & Light Co. preferred stock and provide for Pacific Power & Light second preferred stock before January first. Please call directors meeting for next Friday afternoon or Saturday morning, as you prefer. Resolutions and waiver of New York directors mailed to you to-night. Stockholders meeting will be held December twenty-ninth. Notice to stockholders in New York books will be mailed from New York office December nineteenth. It will be necessary for you mail notices from Portland on same date to stockholders shown on Portland books. We will wire form of notice to you by night letter December eighteenth but [549] suggest you obtain list of stockholders shown on Portland books on eighteenth to insure mailing notices to them on nineteenth. Pacific Power & Light executive committee meeting will be held here Monday to authorize closing of books at close of business on December eighteenth, books to re-open December thirtieth.

F. G. SYKES”

(Testimony of Will T. Neill.)

By Mr. Slaff:

Q. Now, Mr. Neill, I want to call your attention to a copy of either a telegram or a letter from Mr. F. G. Sykes to Mr. Guy W. Talbot, dated New York, December 17, 1913 (Counsel handing a paper to the witness).

Have you had an opportunity to read that, Mr. Neill? A. Yes, sir.

Mr. Slaff: I should like to offer this document and have it marked as an exhibit, Mr. Examiner.

Trial Examiner: It will be marked for identification as Exhibit No. 25.

(The document referred to was marked Exhibit No. 25 for identification.)

By Mr. Slaff:

Q. Now, that document, Mr. Neill, was a direction, was it not, by American to Pacific to make a certain purchase: i.e., the Vancouver Gas Company? [549-A]

A. Well, it was the expression of a belief. Mr. Sykes felt that the Pacific Company should immediately make arrange- [549-B] ments to purchase the Vancouver property, and suggesting certain procedure to be followed.

Q. Well, have you completed your answer?

A. Yes.

Q. I call your attention, Mr. Neill, to the fact that perhaps it was more than what you would call a suggestion. For example, the sentence about in the middle of the telegram, or letter, "Wire

(Testimony of Will T. Neill.)

rush Thursday date you expect hold this meeting and that you approve this plan.”

Had you noticed that?

A. Yes. Of course, I don't know anything about this transaction. I never have seen the telegram before, and I don't know what was back of it, as I said in respect to the stock transaction, in an earlier exhibit.

Q. Now, it also appears, does it not, that American was very anxious to obtain additional Pacific bonds, and that was the reason for transferring Vancouver to Pacific at that time?

Mr. Laing: Mr. Examiner, again I suggest that the letter and the inferences that are to be drawn from it are matters which this witness has no special competency to discuss, and his opinion about it would be completely immaterial.

Mr. Slaff: As to that, Mr. Examiner, I might suggest that I am merely calling attention to particular points in this telegram which I think are informative for the record. [550] I am merely adopting the procedure, really, that Mr. Laing used in his direct examination of Mr. Neill. Now, he is calling particular attention to particular passages, long passages, many of them, in Exhibit 17, which he felt, and understandingly, quite properly should be included in the record, and that is all I am doing at this time.

Mr. Laing: I was asking Mr. Neill about things that he had done and prepared himself; whereas, this is a document between other parties.

(Testimony of Will T. Neill.)

Mr. Slaff: Mr. Neill didn't have anything to do with, as I recollect, Priest Rapids,—Priest Rapids development. There is no question about that.

Trial Examiner: We will let Mr. Slaff proceed, and I trust that you will do it expeditiously.

Mr. Slaff: Oh, surely.

Mr. Laing: I have no objection to the telegram being copied into the record, if you would like to do that, Mr. Slaff.

Mr. Slaff: In a minute. May we have the last question, Mr. Reporter?

(Whereupon, the reporter read as follows:) Question: Now, it also appears, does it not, that American was very anxious to obtain additional Pacific bonds, and that was the reason for transferring Vancouver to Pacific at that time?"

A. As I say, I don't know anything about the transac- [551] tion. I don't think that follows from the wording of the telegram.

Q. Well, I call your attention, Mr. Neill, to the following:

"After deeding Vancouver to Pacific Company," towards the end of the telegram, "the increased earnings would undoubtedly allow you issue additional Pacific bonds, and we suggest you have engineers start immediately making certificates, and at above mentioned directors' meeting pass necessary resolution, as we very anxious obtain these bonds early in January, this being reason for transferring Vancouver to Pacific Company at this time."

(Testimony of Will T. Neill.)

A. I am sorry; I didn't read far enough. Well, the telegram, in that respect, speaks for itself. As I say, I know nothing about the transaction or what was back of it, or the negotiations leading up to it.

Mr. Slaff: I should like at this time, Mr. Examiner, to offer this document in evidence, and ask that it be copied physically into the record at this point.

Mr. Laing: No objection, subject only to checking the accuracy of the copy.

Trial Examiner: Do you wish to have it copied in, as well as making it an exhibit, Mr. Slaff?

Mr. Slaff: Yes, your Honor.

Trial Examiner: The Examiner will direct, then, that it [552] be copied into the record. I assume you have no objection to its offer as an exhibit, Mr. Laing?

Mr. Laing: No.

Trial Examiner: All right. Exhibit 25 will be received in evidence.

(Exhibit No. 25 was received in evidence.)

(Testimony of Will T. Neill.)

“File 53-M
Director’s Meetings
& Minutes

copy

“New York, N. Y. Dec. 17, 1913.

Guy W. Talbot
Pacific Power & Light Co.
Portland, Oregon.

We feel that Pacific Power & Light Company should immediately make arrangements to purchase Vancouver and suggest following procedure. American Company to sell to Pacific Company all capital stock of Vancouver Company for actual cost, namely one hundred forty thousand four hundred sixteen dollars eighty cents. This figure includes interest up to and including December 20th. Please send Pacific Company six percent demand note dated December twentieth in favor American Company for above amount. We think Vancouver Company should prior to December thirty-first deed its property to Pacific Company and for this purpose it will be necessary [553] hold Pacific Company directors meeting which meeting can if you desire be delayed until latter part of December in order allow engineer time to certify bonds hereafter mentioned. Wire rush Thursday date you expect hold this meeting and that you approve above plan. Upon receipt your wire we will mail you Vancouver Company shares capital stock held here and statement showing cost. At above mentioned

(Testimony of Will T. Neill.)

director's meeting we suggest you transfer fifty thousand dollars from surplus to general reserve account as of December thirty-first. After deeding Vancouver to Pacific Company the increased earnings would undoubtedly allow you issue additional Pacific bonds and we suggest you have engineer start immediately making certificate and at above mentioned director's meeting pass necessary resolution as we very anxious obtain these bonds early in January this being reason for transferring Vancouver to Pacific Company at this time. We figure Pacific Company including Vancouver earnings can issue one hundred and fifty bonds. In order be safe suggest you arrange issue one hundred and twenty-five bonds.

"F. G. SYKES."

By Mr. Slaff:

Q. Now, Mr. Neill, I ask you whether it is not a fact that a special meeting of the Board of Directors of Pacific Power & Light Company was held on December 30, 1913, at which the directions so contained in Exhibit 25 were [554] carried out; do you know? A. I do not know.

Q. I call your attention to what purports to be a copy of the minutes, or an extract from the minutes, of special meeting of the Board of Directors of the Pacific Power & Light Company held on December 30, 1913, and ask you whether it

(Testimony of Will T. Neill.)

appears from that that those directions in that Exhibit 25 were carried out?

A. Yes. This document indicates, at the Board meeting on December 30, 1913, the Board approved the purchase of the Vancouver.—capital stock of the Vancouver Gas Company in the sum of \$144,416.88 from American Power & Light Company, and the delivery of a note to the American for that amount.

Mr. Slaff: I should like, Mr. Examiner, to have this three-page document, which is an extract from a special meeting of the Board of Directors of the Pacific Power & Light Company, held on Tuesday, December 30, 1913, marked as an exhibit and received in evidence.

Trial Examiner: It will be marked for identification as Exhibit No. 26.

(Exhibit No. 26 was received in evidence.)

HEARING EXHIBIT No. 26

SPECIAL MEETING OF BOARD OR DIRECTORS PACIFIC POWER & LIGHT COMPANY

Pursuant to notice duly given, a special meeting of the Board of Directors of Pacific Power & Light Company was held at the office of the company in the Spalding Building, Portland, Oregon, on Tuesday, December 30th, 1913, at 3:30 o'clock P. M.

(Testimony of Will T. Neill.)

There were present Messrs:

Edward Cookingham

J. C. Ainsworth

Miles C. Moore

Guy W. Talbot

John A. Laing

William Jones

C. Hunt Lewis

Josiah Richards

Philip Buehner

the above named constituting a quorum of the board.

Absent Messrs.

H. C. Lucas

S. S. Gordon

Fred S. Fogg

F. G. Sykes

S. Z. Mitchell

C. M. Dahl

The President of the company, Mr. Guy W. Talbot, acted as chairman and the Secretary, Mr. Geo. F. Nevins, acted as secretary of the meeting.

The president stated to the board that with the advice and approval of such members of the board resident in Portland as he was able to confer with, and also with the approval of the three members of the board in New York City, the company did, on December 20th, 1913, purchase from American Power & Light Company the entire capital stock of Vancouver Gas Company, a Washington cor-

(Testimony of Will T. Neill.)

poration, owning and operating a gas plant and business in the City of Vancouver, Washington, the purchase price paid for said stock being \$144,416.88, for which sum Pacific Power & Light Company had executed and delivered its promissory note in favor of American Power & Light Company; that it seemed best to your President and to such directors as the President was able to confer with in the matter to cause the physical property and franchises of Vancouver Gas Company to be conveyed forthwith to Pacific Power & Light Company, and that in pursuance thereof meetings of the stockholders and trustees of Vancouver Gas Company were held on the 29th instant in the City of Vancouver, Washington, authorizing and directing the deeding of all of the property and franchises, cash and assets of every description of Vancouver Gas Company to Pacific Power & Light Company, and that such a deed had been duly executed and the property transferred by Vancouver Gas Company to Pacific Power & Light Company on said date, said conveyance, however, having been made effective as of 12:00 o'clock P. M., November 30th, 1913; that at said meetings of the stockholders and trustees there was presented an offer of Pacific Power & Light Company, executed by its President and Secretary, agreeing to assume the debts and liabilities of Vancouver Gas Company in consideration of such conveyance of the latter company's property and franchises, and that the deed made had been made in acceptance and pursuance of said

(Testimony of Will T. Neill.)

offer; and that the stock of Vancouver Gas Company purchased by Pacific Power & Light Company on December 20th, as above stated, was represented by John Laing who was appointed proxy by an instrument duly executed in the name and behalf of the company by the President and Secretary, and who was authorized by such proxy to vote in favor of authorizing such conveyance.

Thereupon, upon motion duly seconded and carried, it was unanimously

Resolved that the purchase by Pacific Power & Light Company of the capital stock of Vancouver Gas Company, a corporation of the State of Washington, for the sum of \$144,416.88 from American Power & Light Company and the execution and delivery by Pacific Power & Light Company and the execution and delivery by Pacific Power & Light Company of its promissory note in favor of American Power & Light Company for said sum of \$144,416.88 in payment of said purchase price, be, and the same is hereby in all respects approved, ratified and adopted; and that the action of the officers of this company in causing the aforesaid stock so purchased to be voted in favor of the conveying of the property, assets and franchises of Vancouver Gas Company to Pacific Power & Light Company in consideration of Pacific Power & Light Company's agreeing to assume the debts and liabilities of said Vancouver Gas Company, and all other action taken by the officers of this company in connection with the acquisition of the property,

(Testimony of Will T. Neill.)

assets and business of said Vancouver Gas Company, be, and such action is in all respects approved, ratified and adopted.

Mr. Slaff: Again, with respect to this document, Mr. Examiner, I regret to say that I have no copies, but I will furnish copies within the next day or two.

Trial Examiner: Very well, Mr. Slaff. [555]

Mr. Liang: Do you want to offer this now, Mr. Slaff?

Trial Examiner: Yes. He did offer it.

Mr. Laing: I have no objection to its receipt.

Trial Examiner: It will be received as Exhibit 26.

By Mr. Slaff:

Q. Now, Mr. Neill, I wish to call you attention to a letter dated June 4, 1924, on the letterhead of Electric Bond & Share Company, 71 Broadway, New York City, addressed to Mr. Guy W. Talbot, President of the Pacific Power & Light Company, signed by C. E. Groesbeck, (counsel handing a paper to the witness).

Mr. Slaff: I should like to have that document, Mr. Examiner, marked as the next exhibit number for identification.

Trial Examiner: It will be marked as Exhibit No. 27 for identification.

(The document referred to was marked Exhibit No. 27 for identification.)

(Testimony of Will T. Neill.)

By Mr. Slaff:

Q. Mr. Groesbeck, in 1924, was president of the American Power & Light Company, was he not?

A. I don't know, Mr. Slaff, what position he held.

Q. Well, you can verify whether or not he was president at that time, can you not?

A. It can be verified. [556]

Q. In any event, he was one of the major officers,—one of the major executive officers of the American Power & Light Company at that time; is that correct?

A. I don't know. This letter is written on the Electric Bond & Share Company's stationery. He was,—at least, I know he was a major officer of one of the two companies; but I am sorry that I am not familiar with this.

Q. Well, it is understandable why you would not have the exact detail of the particular positions they occupied from time to time. Will you be good enough to check that, if you can, reasonably readily, simply so that the record will be complete.

Mr. Laing: I will make a record of it, Mr. Neill.

The Witness: O.K.

By Mr. Slaff:

Q. Now, I suppose you would agree, too, that this letter speaks pretty well for itself?

A. I think it does.

Mr. Slaff: Mr. Examiner, I should like at this time to offer this document in evidence as the next

(Testimony of Will T. Neill.)

exhibit. and ask that it be copied into the record at this point.

Mr. Laing: No objection.

Trial Examiner: Very well. So ordered. Exhibit 27 will be received.

(Exhibit No. 27 was received in evidence.)

[557]

..File 53-B

P. P. & L. Co.-Organization

“ELECTRIC BOND AND SHARE COMPANY

Seventy-One Broadway

New York

June 4, 1924.

Mr. Guy W. Talbot. President.
Pacific Power & Light Company.
Portland, Oregon.

Dear Mr. Talbot:

“I enclose herewith resignations of Mr. Sykes as a director. member of Executive Committee and Vice-President of both Portland Gas & Coke Company and Pacific Power & Light Company.

“To fill the vacancies created. and to provide us with sufficient members of your Boards to hold Executive meetings here when necessary. I suggest that on the acceptance of these resignations you elect Mr. Silliman a director, a member of Executive Committee and Vice-President of Portland Gas & Coke Company, and a director and member of Executive Committee of Pacific Power & Light Company. It will not be necessary to elect him a

(Testimony of Will T. Neill.)

vice-president of the latter company as we already have two vice-president of that company here, which is sufficient, and I think it is desirable, for local reasons, to limit to the smallest number necessary the number [558] of New York directors and officers.

“I am sorry not to have seen more of you during your recent visit here, and hope for better luck next time.

“With personal regards and best wishes, I am

“Yours very truly

(Signed) C. E. GROESBECK

CEG-JJG-enc.”

By Mr. Slaff:

Q. Do you know, Mr. Neill, whether Mr. Silliman was elected a director and member of the Executive Committee of the Pacific Power & Light Company following receipt of this letter?

A. No, I do not.

Q. Well,—

Mr. Laing: (Interposing) Maybe we can dispose of this.

By Mr. Slaff:

Q. I call your attention to the minutes of the quarterly meeting of the Board of Directors of Pacific Power & Light Company held on July 16, 1924, and I ask you whether it is not a fact that the resignation of Mr. F. G. Sykes as director and member of the Executive Committee and vice-president of the Company was tendered and accepted?

(Testimony of Will T. Neill.)

A. That is right.

Q. And I ask you if it is not a fact, also, that thereupon, Mr. Frank Silliman, Jr., of New York, was elected [559] a director of the Company and was also elected a member of the Executive Committee of the Board to fill the vacancy in said offices, caused by the resignation of Mr. Sykes? [560]

A. That is correct.

Q. I next wish to call your attention to a letter dated July 5, 1926, on the letterhead of the Electric Bond & Share Company, 71 Broadway, New York, to Mr. Guy W. Talbot, President, and signed by Frank Silliman, Jr., and ask you to read it, for your information.

(Counsel handed the paper to the witness.)

Have you had an opportunity to read that now, Mr. Neill? A. Yes, sir.

Mr. Slaff: I would like to ask that this document be marked as an exhibit, Mr. Examiner.

Trial Examiner: It will be marked for identification as Exhibit No. 28.

(The document referred to was marked exhibit No. 28 for identification.)

Mr. Slaff: I would like to offer this document, Exhibit No. 28 for identification, in evidence, and ask also that it be copied into the record at this point.

Mr. Laing: I have no objection.

Trial Examiner: It will be so ordered. Exhibit 28 will be received.

(Exhibit No. 28 received in evidence.)

(Testimony of Will T. Neill.)

(The document referred to, Exhibit No. 28,
is as follows:) [561]

“ELECTRIC BOND AND SHARE COMPANY
Seventy-One Broadway
New York

July 10, 1926

Mr. Guy W. Talbot, President,
Pacific Power & Light Company,
Gasco Building, Portland, Oregon.

Dear Mr. Talbot:

Messrs. Mitchell, Groesbeck and Farrar have approved the plan for calling the outstanding First Lien General Mortgage Bonds of Pacific Power & Light Company as set forth in the enclosed computation.

This computation is based on calling these Bonds as of September 1st but if you approve we will proceed to call them at the earliest date practicable, and we are now preparing the papers necessary to effect this retirement and will send them to you as soon as possible. We discussed this matter when you were last in New York and I expect that you will approve this plan.

Please note that the plan contemplates borrowing \$1,287,500.00 from American Power & Light Company at the present rate of interest, (6%)—being the amount required to pay the principal and Premium of three (3) points upon the amount of \$1,250,000.00. The collateral to these Bonds, being an equal amount of the 5's now outstanding, will be free in the Treasury of the Company. [562]

(Testimony of Will T. Neill.)

Please note also that we have planned on amortizing the discount and expense on the 8's and the premium of three (3) points, to be paid when the Bonds are retired, over a period from the date of retirement to August 1, 1930. We are doing this because, later on when the 5's are called, and Pacific Company is refinanced, we will probably be able to lose this discount and premium through an intermediary in that transaction. This is in line with your suggestion, made some time ago. If there should be any valid objection raised to this, as for instance, by the Commission, we would immediately charge it off to profit and loss without serious impairment of the surplus account, as it will require only about \$9,000.00 of which about \$10,000.00 would come back at the end of the first year in income tax saving.

The present tendency in income tax legislation seems to be to lower taxes as a whole and increase the Corporation taxes and, if we were to charge the balance of this unamortized discount and premium to surplus account later on, we would probably save more than if it was done now, but to me the principal point seems to be that we may be able to lose the unamortized balance in the major refinancing operation of the Company when the 8's are called.

Please let me hear from you as soon as possible so that we may proceed.

Very truly yours,

(Signed) FRANK SILLIMAN, JR." [563]

(Testimony of Will T. Neill.)

By Mr. Slaff:

Q. You have already identified Messrs. Mitchell, Groesbeck and Sullivan. Can you tell us about Mr. Farrar, who was mentioned in the first sentence of the letter?

A. No sir; I cannot.

Q. Was he connected with the Pacific Light & Power Company, to your knowledge, at this time, in 1926?

A. I think not—not, in the western organization.

Q. Well, will you check for us and advise us, Mr. Neill, whether or not Mr. Farrar was a vice-president of Electric Bond & Share Company?

A. Yes, sir.

Q. All right. And a director of that company, and whether or not he was in charge of or had important responsibilities in connection with the bond department of Electric Bond & Share Company.

Now, I call your attention, Mr. Neill, to the fourth paragraph of that letter, and particularly to the first two sentences thereof, which read as follows:

“Please note also that we have planned on amortizing the discount and expense on the 8’s and the premium of three (3) points, to be paid when the Bonds are retired, over a period from the date of retirement to August 1, 1930. We are doing this because, later on when the 5’s are called, and Pacific Company is refinanced, we will probably be

(Testimony of Will T. Neill.)

able [564] to lose this discount and premium through an intermediary in that transaction."

Now, in that transaction subsequently, when the 5's were called, was an intermediary used?

A. When the 5's were called?

Mr. Laing: Those were never called, Mr. Slaff.

By Mr. Slaff:

Q. Well, when Pacific was refinanced in 1930, was an intermediary used?

A. I don't know exactly what this letter means in that respect; but as to the refinancing in 1930, I don't believe there was any intermediary used.

Q. You do not believe there was one?

A. Any intermediary used.

Q. Who is Mr. L. Boyd Hatch?

A. I think, if I recall—I don't know exactly—as I recall, Mr. L. Boyd Hatch was a man who had handled the acquisition of some property in Washington and Idaho, which ultimately got into Inland Power & Light Company.

Mr. Laing: That was in 1925, Mr. Slaff. It was not subsequent to 1926.

By Mr. Slaff:

Q. Did Mr. Hatch have anything to do with the Pacific refinancing?

A. As far as I know, he didn't; but I don't know [565] all of the details of that refinancing. In respect to the details, any statement of mine would be somewhat speculative.

Q. I certainly wouldn't want you to speculate. Will you be good enough to check for us and tell

(Testimony of Will T. Neill.)

us whether the prediction or the hope expressed in the letter that "we will probably be able to lose this discount and premium through an intermediary in that transaction" came true; whether it was carried out? A. I will be glad to.

Q. Now, it is also a fact, is it not, that from time to time your Company was advised—directed, by American as to when Board of Directors' meetings should be held, and what action should be taken?

A. Well, are you referring now to these exhibits that we have just been discussing today?

Q. I am referring to other occasions.

A. Well, I think at all times during the Company's history, the American Company has been active in assisting Pacific Company in all of its financing and refinancing transactions, and I think the natural result of that assistance would be just along that line, at least, making the suggestions as to the most effective way of carrying out these arrangements as to Board meetings and things connected with the actual transaction. [566]

Q. Would it be fair to say that the American's role went further than making suggestions, and that the American really called the turns on important matters such as that?

A. As I said in my earlier testimony, I have been with the Company for 20 years, and I know of no instance where a thing like that happened, because the policies are decided locally and, so far as I know, entirely so.

(Testimony of Will T. Neill.)

Mr. Slaff: I should just like to have marked for identification a telegram under date of December 21, 1927, addressed to Guy W. Talbot, Pacific Power & Light Company, signed by Frank Silliman, Jr.

Trial Examiner: It will be marked for identification as Exhibit No. 29.

(The Document Referred to Was Marked Exhibit No. 29 for Identification.)

Mr. Slaff: I should like to have that document received in evidence and copied into the record at this point.

Mr. Laing: No objection, Mr. Examiner, subject to our checking as to accuracy of the copy.

Trial Examiner: Very well. It will be so ordered. Exhibit 29 will be received.

(Exhibit No. 29 Received in Evidence.)

(The document referred to is as follows:)

“Western Union Telegram

1927 Dec 21 PM 5 42 [567]

NA 310 65 Collect NL. New York NY 21

Guy W. Talbot

Pacific Power & Light Company Public Service Bldg Portland Ore We Mailing You Tonight Following in Pacific Bonds Redemption Matter in Two Sets, One by Airmail, One by Train Mail: First Draft of Resolutions to Be Submitted to Pacific Board: Second, Draft of Notice of Redemption for Publication Stop American Power

(Testimony of Will T. Neill.)

& Light Company Board Meets Friday to Act Upon Entire Reorganization Plan Stop Do Not Call Board Meeting Until You Advised of Action of American Power & Light Company Board.

FRANK SILLIMAN JR."

By Mr. Slaff:

Q. What water properties did your company own in 1929? Do you know, approximately?

A. 1929?

Q. Yes.

Trial Examiner: I don't think that is clear, Mr. Slaff. Do you mean water sites?

Mr. Slaff: No, no; water systems, retail water systems.

A. Well, I know that we owned the water system at Kennewick, Washington; I think all the others had been disposed of—all the others which had been owned prior to that time had been disposed of by 1929.

By Mr. Slaff:

Q. And that property was owned by the Pacific Power & [568] Light outright?

A. That is right; you mean, Kennewick?

Q. Yes. A. Yes.

Q. It was not owned by the American?

A. 1929?

Q. Yes. A. That is right.

Q. It was not? A. That is right.

Q. It was not owned by Electric Bond & Share?

A. No.

(Testimony of Will T. Neill.)

Q. Why did you have to get permission from Bond & Share or from American in order to determine whether you could negotiate for the sale of those properties?

A. Well, I don't think it would have been necessary.

Q. Well, I call your attention to a telegram from Guy W. Talbot to Frank Silliman, Jr., under date of April 11, 1929.

Mr. Slaff: I should like to ask, Mr. Examiner, that that be marked as an exhibit for identification.

Trial Examiner: It will be marked for identification as Exhibit 30.

(The Document Referred to Was Marked Exhibit No. 30 for Identification.) [569]

By Mr. Slaff:

Q. Now, I ask you, Mr. Neill, whether, in the light of that telegram, you would care to change your last answer?

A. May I have the question and answer read—the question which you asked and the answer?

Q. Surely.

(Thereupon, the question and answer referred to were read aloud by the reporter as follows:

“Q. Why did you have to get permission from Bond & Share or from American in order to determine whether you could negotiate for the sale of those properties?

(Testimony of Will T. Neill.)

“A. Well, I don’t think it would have been necessary.”)

By Mr. Slaff:

Q. Now, I will ask you whether, in the light of this telegram of April 11, 1929, which has been marked as Exhibit 30 for identification, you would like to modify your last answer.

A. No; I am not modifying the answer. As I remember, at this particular time Mr. Frank Silliman—when the letter was written—I may be wrong about this, but, as I recall, he was an operating sponsor or adviser, and a matter of this kind would naturally be discussed with the sponsor, especially in view of the fact that apparently some time prior to April 11, 1929 it had been under discussion. What was in the minds of the two gentlemen, of course, concerning the desirability [570] or lack of desirability of disposing of this particular water system, I don’t know. I think this is a natural result of that sort of a situation.

Mr. Slaff: I should like to offer at this time, Mr. Examiner, this Exhibit 30 for identification in evidence, and also ask that it be copied into the record at this point.

Mr. Laing: I have no objection.

Trial Examiner: It will be so ordered. Exhibit 30 will be received.

(Exhibit No. 30 received in evidence.)

(The exhibit referred to, Exhibit 30, is as follows:)

(Testimony of Will T. Neill.)

“Western Union Telegram

April 11, 1929.

Frank Silliman Jr., Vice President,
Electric Bond and Share Company,
No. 2 Rector St.,—New York, N. Y.

Responsible party believes he in position to sell our domestic water system but will require commission stop Please advise if all right to negotiate stop Last time I had this matter up you thought best to let matter rest as you might want to trade these for some other properties. Please advise.

GUY W. TALBOT”

By Mr. Slaff:

Q. By the way, Mr. Silliman, you thought, was a sponsor of the Pacific Power & Light Company; he was not [571] employed in that capacity by the Pacific? A. Oh, no.

Q. He was employed in that capacity in the Electric Bond & Share?

A. Yes, and acting under the service agreement which the Pacific Power & Light had with the Electric Bond & Share.

Q. And I call your attention, also, to a telegram dated April 13, 1929, from Mr. Silliman to Mr. Talbot in response to this telegram of April 11, which has already been marked for identification as Exhibit 30 and received in evidence.

Mr. Slaff: I ask that that be marked for identification.

(Testimony of Will T. Neill.)

Trial Examiner: It will be marked for identification as Exhibit 31.

(The document referred to was marked Exhibit No. 31 for Identification.)

Mr. Laing: It is agreeable with me to have the exhibit corrected to "will advise".

Mr. Slaff: I am sure that that is correct. May the reporter be directed to insert the "will" in front of the word "advise" on the second line, in lieu of the word "all"?

Trial Examiner: Yes. I will ask the reporter to make the physical correction on the exhibit.

Mr. Slaff: I should like to have this document received in evidence, Mr. Examiner, and copied into the record at this [572] point.

Mr. Laing: No objection.

Trial Examiner: If there is no objection, it will be so ordered. Exhibit 31 will be received.

(Exhibit No. 31 received in evidence.)

(The document referred to, Exhibit 31, is as follows:)

"Western Union Telegram

1929 Apr 13 AM 10 47

SA 185 28 Collect CD New York NY 13 19A

Guy W. Talbot President

Pacific Power & Light Co Public Service Bldg.
Portland Oregon

Your Night Letter Eleventh Stop Think it All
Right to Start Negotiations Stop Will Advise
You in Few Days Whether Any Possibility of
Trading Water for Electric Properties

FRANK SILLIMAN JR." [573]

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC POWER & LIGHT COMPANY, and
AMERICAN POWER & LIGHT COMPANY,
Petitioners,
vs.
FEDERAL POWER COMMISSION,
Respondent.

Transcript of the Record
In Three Volumes
VOLUME II
Pages 273 to 559

UPON PETITION FOR REVIEW OF ORDER OF THE
FEDERAL POWER COMMISSION

FILED

JUL 15 1943

No. 10386

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UPON PETITION FOR REVIEW OF ORDER OF THE
FEDERAL POWER COMMISSION

(Testimony of Will T. Neill.)

Afternoon Session [574]

Q. Now, I would like to go back with you to the time of the first transaction in Pacific history, that is, the acquisition of the properties from American in 1910.

In the first place, there was at that time an intermediary used in the transaction, was there not?

A. As between American——

Q. As between American and Pacific? [577]

A. Yes.

Q. That intermediary, as disclosed by the minutes of July 23, Exhibit 20, was Mr. Weld M. Stevens? A. Weld M. Stevens.

Q. Mr. Stevens was a member of the firm, or an employee of the firm of Simpson, Thatcher & Bartlett, was he not?

A. I don't know.

Mr. Laing: I will concede he was a member of that firm or office.

By Mr. Slaff:

Q. What was the purpose of using an intermediary in this transaction?

A. I really don't know.

Q. As far as you have been able to ascertain, was any useful purpose served by using an intermediary?

A. I did not examine into that at all; as I say, I don't know about that.

Q. You then, I take it, did not go into this

(Testimony of Will T. Neill.)

phase of the original transaction and try to get any further information as to that particular phase?

A. As to the use of the intermediary, no, I did not.

Q. In what state was Pacific Power & Light incorporated? A. State of Maine. [578]

Q. And, of course, it was incorporated or caused to be incorporated by the American?

A. I believe so.

Q. And the purpose of the incorporation of the Pacific was to have a company take over certain properties that had been bought up by American here in the northwest; is that correct? Is that correct, essentially, and to operate those properties?

A. Yes, I think so; and, I think, to assemble the properties and to operate them; they are one and the same thing. I think that is correct. They are part of the same transaction.

Q. Pacific was incorporated, was it not, in July of 1910? A. June 16, 1910.

Q. Now, a few months prior to that time American had caused to be incorporated two other corporations to take over certain properties, which it had acquired here in the northwest; is that correct?

A. Yes, there were two corporations.

Q. And one of those was the Columbia Power & Light Company?

A. Yes, the Columbia Power & Light Company, and the Yakima-Pasco Power Company.

(Testimony of Will T. Neill.)

Q. Now, according to page 40 of your Exhibit 15,— [579]

A. (Interposing) Page 40?

Q. Yes. According to that, the Columbia Power & Light Company was incorporated April 20, 1910 by Mr. E. M. Scanlon and James C. Stapleton?

A. I believe it was April 28.

Q. April 28, 1910? A. Yes.

Q. Under the laws of the State of Washington, with an authorized capital stock of \$3,000,000, 30,000 shares at \$100 each; that is correct, is it not?

A. I believe so, yes.

Q. And Mr. Stapleton was an attorney, was he not, here in Oregon?

Mr. Laing: He lived in Vancouver. He was a practicing attorney at Vancouver, and Mr. Scanlon, I think, was associated with him in his office.

By Mr. Slaff:

Q. When the statement is made that the Columbia Power & Light Company was incorporated by Messrs. Scanlon and Stapleton, that merely sets out the formal incorporators of that company; is that right? A. That is right.

Q. And so, too, when a similar statement is made at page 56 of your exhibit, at the bottom, that the Yakima-Pasco Power Company was incorporated March 31, 1910, by Mr. E. M. [580] Scanlon and James C. Stapleton, under the laws of the State of Washington, with an authorized capital stock of \$3,000,000, divided into 30,000

(Testimony of Will T. Neill.)

shares, par value \$100 each, again you are merely stating the nominal incorporators of that company?

A. That is correct.

Mr. Laing: Mr. Slaff, we are prepared to concede that those two companies were incorporated at the instance of the American Power & Light Company, or, in effect, by it as a temporary gathering place for the properties which they expected to turn over to the Pacific.

By Mr. Slaff:

Q. I take it that you agree with that statement, Mr. Laing has just made?

A. That is my understanding, yes.

Q. When did American come into this territory, or, rather, first start buying property in this territory?

A. I believe their first purchase was the Astoria Electric properties.

Q. About when was that, Mr. Neill?

A. That was either in 1909 or 1910.

Q. Prior to that time the American had owned no properties up here in this neighborhood, had it?

A. I believe not.

Q. Now, after it acquired the properties which ultimately came over to the Pacific, certain of those [581] properties went over to the Columbia Power & Light Company; is that right?

A. Yes; the Columbia Power & Light Company; that is, that corporation for a short time held a certain group of properties; and the Yakima-Pasco, another group. The Astoria Electric

(Testimony of Will T. Neill.)

Company was, of course, an isolated property in the State of Oregon.

Q. And that remained in the corporate organization of the Astoria Electric Company until the properties went over finally to the Pacific?

A. That is right.

Q. And do you have a statement of the cost of these properties to the Pacific? Can you at this time give us the cost of those properties?

A. Yes. Those properties which were acquired by the Pacific from the American cost the Pacific \$10,900,000, as shown in Exhibit 17.

Q. I should like to have you state the cost to the American. I may have called for the cost to the Pacific, but I would like to have you state the cost to the American at this time.

A. The cost to the American is the amount of \$10,900,000, less the amount of \$4,907,248.66, as shown on page 47 of Revised Statement B.

Q. That is, then, a cost to the American of approximately [582] \$6,000,000?

A. Slightly over \$6,000,000, I believe.

Q. At what amount did these properties that were transferred to the Columbia Power & Light Company and to the Yakima-Pasco go on the books of those companies?

A. Of those companies? What do you mean?

Q. What was the plant account of the Columbia and the Yakima-Pasco?

A. I think I will have to look that up.

Q. Surely.

(Testimony of Will T. Neill.)

A. I think that is in Revised Statement B, that it, Exhibit 17. It may take a little time to explain that. So far as it relates to the Columbia Power & Light Company, that is explained, starting on page 16 of the Revised Statement B. I don't believe—I will have to work it out. I don't have that figure before me.

Q. Let me refer you to page 6 of Exhibit 16 for identification, the staffs' Joint Report, and ask you whether you can tell us from that, what is shown in that report, what the total of the plant account of the Yakima-Pasco, the Columbia, and Astoria were just prior to the transfer of these properties to the Pacific?

A. Well, on that page of Exhibit 16 it shows the plant account of the three companies, totaling \$9,001,106.77.

Q. And just for the sake of completeness, that shows [583] the plant account, does it not, of the Astoria Electric Company as—

A. (Interposing) \$653,253.40; Columbia Power & Light Company, \$4,017,179.53; and \$4,330,673.84 for the Yakima-Pasco Power Company.

Q. Making the total of \$9,001,000 mentioned in your last answer; is that correct?

A. That is correct. I have not personally checked those items, and I can't say whether they agree with our Revised Statement B or not; but they are gotten from the same source, and I would expect them to check.

Q. I take it that these figures have been

(Testimony of Will T. Neill.)

checked by the men working under your direction, Mr. Phipps and——

A. (Interposing) Yes. Mr. Phipps has done the detail work; I don't remember the figures myself.

Q. But you certainly have been advised by your people of the figures for the plant account shown on page 6 of the Joint Report, which is marked as Exhibit 16?

A. Yes, I have been advised.

Q. And you have not been advised that those figures are incorrect?

A. No, I have not. [584]

By Mr. Slaff:

Q. In connection with another study which you have been making very recently, and the details of which you turned over to Mr. O'Neil the other day, I notice that you have a statement of total estimated cost to American Company by companies totaling \$5,543,435.00. Do you have that before you, Mr. Neill?

A. Yes, I do.

Q. That is correct, is it not?

A. Yes. That total figure was computed from a statement given to Mr. Flynn with my letter of December 27, 1940. That is a statement which we obtained from the American Power & Light Company at the request of the examiners.

Q. Just a few moments ago you indicated as the cost to American a figure of approximately six million dollars. I wonder if you would be good

(Testimony of Will T. Neill.)

enough to tell what is represented by the difference between \$5,543,000 and a figure of approximately six million, so that the record may be complete on that score. Let me put it this way; perhaps we can proceed a little more rapidly. Was that difference of approximately \$450,000, bond discount?

A. Yes. Of course, that is the item, \$448,616.25.

Q. All right.

A. I am sorry that I overlooked that.

Q. Now, then, so that up to this point, before Pacific [585] gets into the picture, we have a situation of American buying properties at a cost of approximately five and a half million dollars which, plus discount, comes to approximately six million, and those properties getting into the plant account of Columbia Power & Light and Yakima-Pasco, which had been organized by American, and Astoria, which American owns, getting into those plant accounts of those three companies at approximately nine million dollars. Right?

A. That is what those records show, yes. May I say, in connection with that, in working up our original costs, we used as our basis, getting original cost at the time of acquisition, the original costs that were on the books of the predecessor companies to Columbia Power & Light and the others.

Q. Oh, yes.

A. Plus whatever actual net additions, if any, had been made, or additional costs incurred by

(Testimony of Will T. Neill.)

Columbia and the Yakima-Pasco Power Company and Astoria.

Q. Yes. Well, that is something which we will take up subsequently, the difference between original cost to predecessors and cost to American. At this time I am interested in discussing with you the difference between cost to American and amounts which were ultimately recorded on the books of Pacific. Now, the next step in the transaction, then, in getting the properties over to the company to operate [586] them, was the creation of Pacific? Right?

A. That is correct.

Q. And as we have discussed, and as you have testified, in getting those properties over to Pacific from Astoria, Columbia, and Yakima-Pasco, the personal intermediary, Mr. Weld M. Stevens, was used, and when the properties came over to Pacific, at what figure did they appear in the plant account of Pacific?

A. \$10,900,000, including the debt discount and expense.

Q. Now, is the difference between the figure which appeared on the books of Pacific, \$10,900,000, and the cost of these properties to American, a write-up?

A. I don't think so. The Pacific Power & Light Company purchased those properties from American for certain securities which were turned over to the American, and the cost to Pacific was recorded on the Pacific's books of \$10,900,000, as I

(Testimony of Will T. Neill.)

see it, it being the value of those properties at the time, in the judgment of the directors of the Pacific Company.

Q. Now, in the first place, Mr. Neill, a determination of whether a transaction is a write-up, it must be made as of the time of the transaction; is that right? A. I believe so.

Q. Yes. In other words, in determining whether or [587] not this transaction was a write-up, we must look to July, 1910, for that determination. Right?

A. Yes. You must look to 1910, but as I see it, the cost of the properties to Pacific is represented, based on the securities which it paid for the properties. The properties were put on the new corporation's books at the price of \$10,900,000.

Q. Well, now,—

A. (Interposing) There was, of course, the difference between the cost to American and the cost to Pacific.

Q. Now, in the first place, of course, that transaction between American and Pacific was distinctly not an arm's-length transaction; that is right, isn't it?

A. Well, I have testified this morning that the Pacific Board of Directors authorized the purchase of the properties, and it was composed largely of officers or representatives of American and Bond & Share, but as I see it, at the time they recorded that transaction on the Pacific's books,—that is, the directors of Pacific Company, they must have

(Testimony of Will T. Neill.)

recorded what was in their judgment the value of the properties and assets and business which they took over, the cost being recorded on the Pacific books at \$10,900,000.

Q. So when you say, in your answer to the first question in this discussion, that the \$10,900,000 was the value of those properties at that time, in the judgment of the [588] directors of Pacific, shouldn't you better say, in order to represent the facts more accurately, that that represented, or may have represented, the value of those properties at that time, in the judgment of the directors of American?

A. No, I don't think so. The American was disposing of those properties. It didn't have to dispose of them to Pacific, and I think it probably was entitled to dispose of them on terms which were satisfactory to it; while the Pacific directors were officers and employees of American, I still believe their judgment may easily have been independent of their affiliation with American. I mean, in other words, that they were in position to exercise for Pacific Company their own judgment as to the value of these assets.

Q. Mr. Neill, did the directors of Pacific who participated in the meeting of July 23, 1910, have any independent judgment as directors of Pacific in respect to this transaction?

A. Well, I have no reason for assuming that they did not exercise independent judgment on behalf of Pacific in their capacity as directors.

(Testimony of Will T. Neill.)

Q. You had some twenty odd years of experience in the utility field as an operative man, and several years of experience prior to that time in the regulatory field; that is correct, is it not?

A. That is correct, yes. [589]

Q. Now, let me put it this way, then: Do you mean to tell us that the conclusion which was arrived at by the Board of Directors of Pacific at the meeting of July 23, 1910, was the same type of judgment as your present Board of Directors exercises when it is considering a purchase or a sale of property?

A. Well, my reply to that must be that so far as the 1910 transaction is concerned, more than thirty years ago, I don't think I, or anybody today, is in position to know exactly what was in the mind of the Pacific directors when they undertook this transaction. I do believe very firmly that when they set up the transaction on the Pacific books,—that is, when they purchased the properties and set up the cost to Pacific at \$10,900,000, they were exercising their judgment as to what the then present and prospective value of that situation was.

Q. Perhaps I have not made myself entirely clear, Mr. Neill. Let me put it this way to you: In the letter from Mr. Mitchell to Mr. Talbot of July 23rd, here in evidence as Exhibit 22, written, apparently, after the meeting, there is a statement, "While we have elected the foregoing as officers in the West, we have not as yet elected any Western

(Testimony of Will T. Neill.)

directors because we want to keep the full Board here until we get through with all the votes relating to the issuance of bonds, stocks, etc." [590]

Now, Mr. Neill, doesn't that, together with everything else you know about this transaction, indicate to you that at this first meeting of the Board, July 23, 1910, the members of the Board were acting on behalf of American?

A. No, that does not indicate that to me. The letter from Mr. Mitchell to Mr. Talbot indicates to me that, at least, it was desirable not to split the Board between the West Coast and the East Coast while all of these transactions were under way. Otherwise, you'd have your Board separated, and it would be difficult to get it together, and I presume these things were running along rather rapidly at that time, and the Board had to take action on various matters. For a matter of convenience, it was better to have it in New York.

Q. Of course, all the members of the Board were elected by American and were employees or officers of American or Electric Bond & Share Company, or Simpson, Thacher & Bartlett; is that right?

A. I don't think there were any Simpson, Thacher & Bartlett men on it.

Q. Well, we can clarify that, but it is of no consequence at the moment. Now, do you mean to tell us, Mr. Neill, that these men met and considered from the point of view of Pacific, rather than from the point of view of American, independently,

(Testimony of Will T. Neill.)

what amount should be established on the books of Pacific for the plant which Pacific was acquiring? [591]

A. Well, as I said before, I have no reason to assume that they didn't act with independent judgment. I can't know, thirty years later, naturally, and I don't think anybody else can, actually what the directors of Pacific had in mind. We do know that they purchased certain properties and gave in payment therefore certain securities, and insofar as Pacific Company is concerned, the cost of those properties to Pacific was the cost as recorded on Pacific books.

Q. Well, did you make any attempt to find out, Mr. Neill, as to what was in the minds of the directors at this first meeting in respect to this matter which we are discussing?

A. No, I did not interview any of those men.

Q. Several of them are still around, are they; that is, in New York, connected with the Bond & Share system?

A. There may be some of them; but as I say, I made no attempt to inquire into that particular thing. As I see it, the cost,—that is, we know what the price they paid for the properties which Pacific purchased at that time was, but, as I say, I have no reason to assume, that it was not set up on the basis of their determination as to the value of the properties, present and prospective, which they purchased.

Q. Well, do you consider it an important mat-

(Testimony of Will T. Neill.)

ter to determine whether or not such amounts as might be set up on the books of a corporation in this connection, are set up as [592] the result of independent judgment of the directors or are they set up as the result of direction from a seller?

A. I don't know how, at this stage, anybody could determine what was in their minds.

Q. Well, let's assume that could be determined. Mr. Neill. Now, will you tell me whether you consider that determination of importance in your reclassification?

A. May I have that question again, please?

Mr. Slaff: Mr. Reporter, will you please read the last preceding question?

(The question referred to was read by the reporter as above recorded.)

A. Well, I think that would be something that one should find out if it can be disclosed, yes.

Q. Well, if it can be disclosed, Mr. Neill, might that not be determinative, or very good evidence, at least, whether or not there was a write-up?

A. Well, I don't know what that would show. As I have said before, we know in this particular case that the cost to Pacific Company is the cost as shown on the books. At the same time, we know that that cost to Pacific on Pacific's books is greater than the cost of the same properties to American, by the amount which we discussed before.

Q. Well, now let's get back, if we may, to the

(Testimony of Will T. Neill.)

question. A determination of whether or not the amount that was [593] recorded on the books in the plant account, the determination of whether that amount was recorded as the result of the exercise of independent judgment by the directors of the accounting company, or whether it was so recorded as the result of the direction of an affiliated seller would be important, would it not, in coming to a conclusion as to whether or not the transaction represents a write-up; isn't that correct?

Mr. Laing: Mr. Slaff, isn't the problem there one of assuming that the words "write-up" have some specific and technical significance? Insofar as we are talking about differences in cost, there is no dispute about the difference in cost; but if we are attributing some special technical significance to the words "write-up", perhaps we can define it first, and Mr. Neill will have an easier time in answering your question.

Mr. Slaff: I assume Mr. Neill knew what a "write-up" was, and I am only referring to the term which was used in the System of Accounts. He had answered that a particular transaction was not a write-up. Now, as I say, we are now discussing the System of Accounts. I assume he was using it in the,—whatever manner he interpreted the use of the term "write-up" in that system of accounts.

A. Well, the use of that term, of course, so

(Testimony of Will T. Neill.)

far as the Pacific books are concerned, there is no write-up on the [594] Pacific books. The property is on Pacific books at its cost to Pacific. Now, as I said before, I am not,—there is an admitted difference between the cost to American and the cost to Pacific for the properties which Pacific purchased. We have disclosed that, of course, in our Revised Statement in Exhibit B in the amount of four million, nine hundred odd thousand dollars.

By Mr. Slaff:

Q. Well, as I understand it, you have come to a conclusion that that amount recorded on the books of Pacific Company is not a write-up, as that term appears in the System of Accounts, and as the result, in your mind, of all the studies and and investigations that you have made. Now, however, I have asked you a question with respect to factors going into the ultimate conclusion of whether or not a particular transaction is a write-up, and I wish you would answer that question, if you will, if there is no objection to the question as such; and if there is an objection, we will wait for a ruling on it. The question I asked you just prior to the statement that Mr. Laing made,—will you be good enough to read that, Mr. Reporter?

(Whereupon the reporter read as follows:)
“Question: Well, now let’s get back, if we may, to the question. A determination of whether or not the amount that was recorded on the books in the plant account, the determination of [595] “whether that amount was recorded as the result of the

(Testimony of Will T. Neill.)

exercise of independent judgment by the directors of the accounting company, or whether it was so recorded as the result of the direction of an affiliated seller would be important, would it not, in coming to a conclusion as to whether or not the transaction represents a write-up; isn't that correct?"

Mr. Laing: Is that the question that you wished read?

Mr. Slaff: Yes.

Mr. Laing: I thought, perhaps, you wanted him to read my objection. The only point that I made was to make clear whether the term "write-up" is being used as we conceive it to be defined in the System of Accounts, or whether we are speaking about a difference in cost. If the term that we are asking Mr. Neill to respond to, which is write-up, as we understand the System of Accounts, if that is it, I guess we have no dispute.

Mr. Slaff: Yes, that is all. That is the only sense in which I was using it. The sense in which the term appears in the system of accounts is what I have reference to. [596]

A. If I remember the question now, the manner in which the determination was made, as I see it, of the value of the properties to be placed on the Pacific books really does not have anything to do with the question as to whether or not the cost to the Pacific Company, as so recorded, over the cost to American was a write-up. That all depends, of

(Testimony of Will T. Neill.)

course, on the definition of "write-up", which is mentioned in the classification of accounts without much of a definition.

Q. Well, how do you determine the meaning of the term "write-up" to be as it appears in the System of Accounts?

A. As I understand the term "write-up" it is an increased value of the assets placed on the books of the company over and above the value of those assets previously recorded on the books, the change being the result of some revaluation process.

Trial Examiner: I think you may have that a little bit confused. The definition that you just gave, that is your own definition of write-up, and not the Commission's?

The Witness: That was given—I was giving my understanding of it.

Trial Examiner: I thought he asked you what was your understanding of the term as contained in the System of Accounts, and not your general understanding of the term?

Mr. Slaff: I think he answered it properly, insofar as the question was concerned. [597]

By Mr. Slaff:

Q. Was your answer to the effect that that was your understanding of the term "writeup" as used in the System of Accounts? That is, that you understood it to mean an increase in the value of the assets previously recorded, as you just testified?

A. That is my understanding of it.

(Testimony of Will T. Neill.)

Q. Then in your view, as you conceive the situation, is it your opinion that there can be no write-up as long as a separate corporation is introduced into the situation?

A. Well, as I understand the term "writeup" it is something which occurs on a particular company's books after an asset has been previously recorded on those books at a certain value. In this particular case, as I see it, as I said before, the cost to the Pacific Power & Light Company is the cost as recorded on the company's books, and we have disclosed that cost exceeded the cost to the American. Now, if we had a pronouncement by some final authority as to what a writeup is, if they ruled that as a writeup, we would have to label it as such; but we don't understand it that way.

Q. I do want to explore with you what your conception is or what you think to be a reasonable interpretation of the term. Now, going back—might we have a recess at this time? I see it is about our normal time.

Trial Examiner: We will have a recess for five minutes. [598]

(Whereupon, a short recess was taken after which proceedings were resumed as follows:)

Trial Examiner: The hearing will be in order.

By Mr. Slaff:

Q. Mr. Neill, going back to the discussion we were having with respect to the determination of the amount at which the properties went over to Pacific in July of 1923 should appear on the books

(Testimony of Will T. Neill.)

of the Pacific.—1910.—July 23, 1910 should appear on the books of the Pacific, isn't it a fact that that was all determined before the Pacific was even organized?

A. Well, I think not. So far as I know, the offer which had been made was considered by the Pacific Board on July 23, whereas the Pacific Company had been organized on June 16, 1910.

Mr. Slaff: Will you read that last answer, Mr. Reporter? I didn't hear the last part of it.

(Thereupon, the last answer of the witness was read aloud by the reporter as above recorded.)

By Mr. Slaff:

Q. Isn't it a fact, Mr. Neill, that prior to June 16, 1910, it had been decided what was to be done by the Pacific in connection with this transaction?

A. I don't know as to that.

Q. Well, I show you a letter dated June 16, 1910— [599] a copy of a letter—addressed to Neil A. Weathers, care of American Power & Light Company, Lewis Building, Portland, Oregon, and signed by Simpson, Thacher and Bartlett, and I will ask you to look that over. (Handing document to witness.)

You have had opportunity to examine the document now, Mr. Neill, on the stand? A. Yes.

Mr. Slaff: I should like to have this document, Mr. Examiner, which is apparently a night letter,—

(Testimony of Will T. Neill.)

dated June 16, 1910, to Neil A. Weathers, care of American Power & Light Company, Lewis Building, Portland, Oregon, and signed by Simpson, Thacher and Bartlett, be given the next exhibit number and received in evidence.

Trial Examiner: It will be marked for identification as Exhibit 32.

(The document referred to was marked Exhibit No. 32 for identification.)

Trial Examiner: Is there any objection?

Mr. Laing: No objection.

Trial Examiner: It will be received.

(Exhibit No. 32 received in evidence.)

Mr. Slaff: I should also like to have this document copied in the record at this point.

Mr. Laing: No objection.

Trial Examiner: So ordered. [600]

(The document referred to, Exhibit 32, is as follows:)

“New York, June 16, 1910

“Neil A. Weathers,
c/o American Power and Light Co.,
Lewis Bldg., Portland, Oregon.

“Papers filed Maine today for organization Pacific Power Light Company. Capitalization six million common; one million and half preferred. Will increase authorized stock later as desired. As soon as company organized propose forward papers for qualification Washington, Oregon, Idaho. Before

(Testimony of Will T. Neill.)

company commences business Washington, and before actual qualification takes place, propose have entire capital stock subscribed by some one representing American Power Light Company. This in order to leave no doubt of compliance provision Washington law relating commencing business before all stock subscribed. Subscription will be made with understanding that company will accept payment of same in property. As far as we see now, intermediaries proposition new company will be as follows: Intermediary will agree transfer property Astoria, also property Yakima Pasco, except contract with Northern Pacific Irrigation Company and Pasco Reclamation Company and any other exclusive feature contracts, also transfer property Columbia Power Light, also capital stock Walla Walla Valley Railway; transfers will be made subject to underlying bonds, the amount of these to be the amount outstanding of record less any acquired by Mitchell. Transfer will take place as of date to be [601] determined either June 1 or July 1, preferably former, purchaser taking all current assets and assuming all current liabilities. Property should be transferred free encumbrances except bonds above stated and current liabilities as of fixed date. Pacific Company will agree issue to intermediary all common stock and one and a quarter millions preferred stock and four million dollars of new five per cent. first and refunding mortgage bonds, less underlying bonds as aforesaid Pacific Company will also agree to assume payment under-

(Testimony of Will T. Neill.)

lying bonds and floating debt. Two hundred fifty thousand preferred stock not to be issued for properties which will be issued from time to time at par for cash. This rough plan may need modification. As noted in previous wire do not understand whether Pacific Company being foreign corporation can undertake business of furnishing water in North Yakima, Pasco and Kennewick. See section 3678 recent Washington revision. Doubt perhaps cleared up by Sec. 9510 if any question exception may have to be made of these properties, but Mitchell strongly objects to such exception for financial reasons. To carry out above plan will require transfers various companies direct Pacific Company and holding meeting various companies to authorize same. If not already done, have necessary papers prepared for holding meetings when required. If any waivers or proxies needed from eastern stockholders wire. Propositions to be made to various companies by intermediary would be to [602] purchase property as of date to be fixed, free encumbrances, except underlying bonds and floating debt in consideration. Assumption by intermediary or his nominee such bonds and indebtedness. After qualification corporation in three states will have deeds of various properties recorded and mortgage new company made. Most important thing at present is agree on fundamental plan for issue securities. Show telegram Talbot, Cotton and other

(Testimony of Will T. Neill.)

persons interested and obtain their suggestion. Wire suggestions promptly.

Simpson, Thacher and Bartlett."

By Mr. Slaff:

Q. Now, Mr. Neill, does this document, Exhibit No. 32 in evidence, indicate to you that the amount at which these companies were to go over to the Pacific had been decided even before Pacific was organized?

A. Not exactly. Of course, this letter is dated June 16, the date of the organization of the Pacific. It is very apparent, as I have already testified, the work of assembling these properties had taken place, at least some of it, prior to the date of organization. I assume from the letter that some—that while the offer of the intermediary had not been accepted, the organizers of the Pacific Company knew, at least with a fair definiteness, what the offer would be.

Q. Didn't they direct what the offer should be?

A. I didn't get that, no. [603]

Q. Well, isn't it a fair statement, Mr. Neill, that the organizers of the Pacific Power & Light Company directed Mr. Stevens, the intermediary, what offer he should make?

A. Oh, I have no knowledge of that, of course.

Q. But as a practical business matter, isn't it a fair statement to make or isn't it a fair assumption, from all the facts?

A. Well, it would be pure speculation on my

(Testimony of Will T. Neill.)

part. I could not assume what was in the minds of persons who were working on the transaction.

Q. Mr. Neill, would it be pure speculation on your part? Is that the way you characterize a conclusion that the organizers of Pacific directed the intermediary what offer to make? Would you characterize such a conclusion as purely speculative?

A. No, I think not.

Q. I mean, such a conclusion would be a fairly reasonable conclusion, would it not?

A. Would you state that again?

Q. The conclusion, from all the facts in this letter and the facts surrounding the transaction, that the organizers of Pacific, to wit, American, directed the intermediary what offer he should make the American for these properties?

A. You mean what offer he should make the Pacific?

Q. Yes. [604] A. I think that is correct.

Q. Sure. Now then, going back to this letter, isn't it a fair conclusion that the basic details had been worked out even before the Pacific was organized?

A. Well, this letter indicates that a considerable amount of headway had been made at the date of organization. Of course, as I said awhile ago, the assembling of these properties and the organization of the Pacific was a part of the same project, they could not occur at the same time.

Q. Now, I am getting over from the point of assembling the properties to the transition or turn-

(Testimony of Will T. Neill.)

ing over of those properties to the Pacific; the properties had been assembled now. Isn't it a fair statement that, after the assembling of the properties, prior to the organization of the Pacific, it had been determined by American at what price these properties were to go over to the Pacific? [605]

A. I think that is the right answer; it had been determined what the offer to the Pacific was going to be.

Q. And it also had been determined, had it not, that the Pacific Company would accept the offer, at the direction of American; isn't that correct?

The Witness: May I have that question?

Mr. Slaff: Surely.

(Thereupon the question was read aloud by the reporter as above recorded.)

A. Well, I think probably I can go along with you on that except "at the direction of American". I mean, the basis of the transaction apparently was pretty definitely defined and, in the course of events, the offer was made to the Pacific, and the Pacific directors accepted it.

Q. And, essentially, the transaction boils down, or boiled down, did it not, into one of American making the offer and American, through Pacific, accepting the offer?

A. Well, as I said before, I don't really know that. The Pacific Board of Directors, which accepted the offer on July 23, were American and Bond & Share employees or officers. I know noth-

(Testimony of Will T. Neill.)

ing about what was in their minds, whether they were directed by American to accept the offer; it is entirely possible, in view of the situation, inasmuch as those men were representing both the American and the Pacific, that the determination had also been made in connection with the [606] possible acceptance of the offer, and that it represented their ideas and judgment as to the value of the property; I mean, supporting their entries on the Pacific books.

Q. Then, again, Mr. Neill, without a speculative thought and just looking at it from your point of view, as a practical business man, isn't it fair summary to say that American made the offer and American advised the Pacific to accept the offer?

A. Well, as I said before, I think the men who were setting up this transaction could very well have, even in their joint identity as directors of the Pacific and employees of American or Bond & Share, made their determinations as to the value of these properties to be turned over to the Pacific, without prejudicing one or the other, or without prejudice as to one or the other. I don't know whether that answers your question or not.

Q. Well, perhaps it does; but what I am trying to do, if I can, is to boil it down to essentials, to the ultimate transaction; and what I am asking you is, wasn't this the situation: American was dealing with American; American was making the offer and the American group was accepting it?

A. The Pacific directors, of course, accepted the

(Testimony of Will T. Neill.)

offer. They were American employees or Bond & Share employees. I tried to explain that a while ago. That, even before acceptance of the offer by Pacific, these men had settled in their [607] own minds what the values of those properties were, and at what amount they should be turned over to the Pacific; that is evident; and that the Pacific would accept the offer.

Q. Well, so, if I state that that transaction, to me, represents nothing more than American dealing with itself, via the interposition of the Pacific, would you say that was unfair or an unreasonable statement?

A. Well, there was a pretty close tie-up.

Q. I am still trying to find out whether you would say that was an unfair conclusion, or whether I am unfair in making such a statement?

A. Well, I can't divorce in my own mind that, so far as the Pacific Company was concerned, while these directors who were employees, also, of American and Bond & Share, when they accepted the proposition they accepted it for Pacific and not for American, because they were representing the Pacific at that time.

Q. I don't want to put any words in your mouth, Mr. Neill, or to ask you to say anything in any fashion which you yourself do not want to state, and that is why I put the question the way I did to you. If I should say that this transaction represents nothing more, essentially, than Ameri-

(Testimony of Will T. Neill.)

can dealing with itself, would you characterize that statement of mine as an unfair statement?

A. As to your opinion? [608]

Q. No, no; as to the opinion of a presumably reasonable person?

A. Well, I think, looking at it from your viewpoint, you could draw that conclusion.

Q. And I take it I could draw that conclusion reasonably: isn't that right? A. I think so.

Mr. Laing: May I have the last question and answer. I didn't hear the question.

Mr. Slaff: Yes. I think you will perhaps want the last two or three questions and answers because the ones just before the last question were tied up with it, or tied up with Mr. Neill's answer.

Mr. Laing: Mr. Reporter, will you read the last question and answer.

(Thereupon the last preceding questions and answers were read aloud by the reporter, as follows: "Question: I don't want to put any words in your mouth, Mr. Neill, or to ask you to say anything in any fashion which you yourself do not want to state, and that is why I put the question the way I did to you. If I should say that this transaction represents nothing more, essentially, than American dealing with itself, would you characterize that statement of mine as an unfair statement? Answer: As to your opinion? Question: No, no; as to the opinion of a presumably reasonable person? Answer: Well, I think, looking at it from your viewpoint, you could draw that

(Testimony of Will T. Neill.)

conclusion. Question: And I take it I could draw that conclusion reasonably; isn't that right? Answer: I think so.")

By Mr. Slaff:

Q. Suppose, Mr. Neill, that Pacific had been organized not on June 16, 1910, but, say, a year earlier by American, as it ultimately was, and Pacific had, itself, bought from the same vendors all the properties which American did buy, at the same time as when bought by American, and at the same prices; that would, of course, have been a cost to Pacific of some approximately five and one-half millions of dollars, plus a half a million dollars of discount.

A. I am sorry. I got lost in your question.

Q. This question is on the assumption that the Pacific had been organized, say, in 1909, and had itself bought all the properties that the American bought, bought them from the same vendors, and at the same prices that the American had paid.

A. That is, if the Pacific had been organized as a separate corporation?

Q. By the American in 1909, and American had advanced the funds to it necessary to acquire these properties, and Pacific had gone out and acquired the properties from the same vendors, at the same time, and at the same prices at [610] which the American acquired them, the cost then to the Pacific would have been the amount you have stated here as the cost to American, which is approximately \$6,000,000, including discount?

(Testimony of Will T. Neill.)

A. I think, on those assumptions, that is correct.

Q. Now, supposing Pacific had then entered these properties on its books as of July 1, 1910, at a figure of \$10,900,000, in what account, under the Federal Power Commission's System of Accounts, would the difference between \$10,900,000 and the amount paid for those properties be recorded?

A. According to my understanding of the accounts, it would be in 107.

Q. It was quite a common practice, was it not, in the early days of the American Power & Light Company for a new subsidiary of the American Power & Light to set up on its books as the value of its property an amount substantially in excess of the cost of those properties to American Power & Light?

A. Well, I can't say; I don't know as to the general practice.

Q. Who is Mr. H. L. Aller?

A. He is the President of the American Power & Light Company.

Q. I call your attention,—I take it you are familiar, [611] Mr. Neill, to a certain extent at least, with the integration proceedings involving the Electric Bond & Share system before the Securities and Exchange Commission?

A. Just, generally.

Q. I call your attention to the testimony of Mr. Aller contained at page 9,123 of the transcript of testimony in Docket No. 59-12, In the Matter of Electric Bond & Share Company, et al., before the

(Testimony of Will T. Neill.)

Securities and Exchange Commission, the date of the testimony being March 28, 1941, and I will ask you whether it appears that Mr. Aller testified as follows: [612]

"I will agree with you, however, that it was quite a common practice for a new subsidiary of the American Power & Light Company to set up on its books as the value of its properties an amount in excess of the cost of those properties to the American Power & Light Company."

Mr. Laing: Mr. Examiner, I object to this as wholly irrelevant and immaterial to this proceeding. The question at issue, if there is one here with respect to this particular company, is whether and to what extent there was an excess to the Pacific over the cost to the American, and we are not concerned here with any other matter; we are going quite far afield by going into a transaction between the American Power & Light and other subsidiaries not involved in this proceeding.

Mr. Slaff: I think there has been testimony by Mr. Neill himself that a determination of whether or not the amount recorded on the books of the Company was the result of independent judgment of the Directors of the accounting utility or whether it was the result of direction by a controlling affiliate, and I think that would be important or would be evident in the determination of whether a particular transaction might reasonably be interpreted as a writeup; and I think this particular

(Testimony of Will T. Neill.)

testimony, which I don't want to pursue—this particular thing—but I think it is proper testimony and is of relevance in gauging and judging the transaction in July, 1910, between American and Pacific. [613]

Mr. Goldberg: 1910.

Mr. Laing: Well, there is no dispute between us, Mr. Examiner, with regard to the fact of whether or not there was a difference in the amount between the cost to American and the cost that was recorded on the Pacific books. That fact we very frankly concede. If we get into discussions of what other people did, we are going beyond the scope of this proceeding.

Mr. Slaff: It is not what other people did; it is what the American did.

Mr. Laing: Well, what they did in other instances, if you wish to put it that way.

Mr. Slaff: Surely; what the American did in other instances, I think, is relevant, along that line.

Trial Examiner: Is it your purpose to develop, to some extent, the practices of the American Power & Light Company?

Mr. Slaff: To that particular extent to which I have called Mr. Neill's attention in this excerpt of Mr. Aller's testimony.

Trial Examiner: That objection, Mr. Laing, goes to the relevancy? Is that the basis of your objection?

Mr. Laing: Relevancy and materiality in this proceeding, yes.

(Testimony of Will T. Neill.)

Trial Examiner: The objection is overruled. What is [614] the question?

Mr. Slaff: Just whether it appears that Mr. Aller did so testify: that is the only question that is before the witness.

Mr. Laing: Are you asking Mr. Neill to verify the transcript of the testimony in some other proceeding, by some other witness?

Mr. Slaff: No; I will state that that is the transcript of testimony which we received from the Securities and Exchange Commission. Has there been a ruling?

Trial Examiner: You have no further objection other than the one you previously made, Mr. Laing?

Mr. Laing: I personally think, aside from being irrelevant and immaterial in this proceeding, it is absolutely improper, through any reasonable stretch of the imagination, to ask Mr. Neill what Mr. Aller testified to in some other proceeding.

Mr. Slaff: All right. I will let it go for the moment.

Trial Examiner: I am inclined to agree with that.

By Mr. Slaff:

Q. Mr. Neill, I will call your attention to this document (indicating) and ask you what it is?

A. This is a report to the stockholders of the American Power & Light Company, dated July 23, 1941, [615] apparently signed by H. L. Aller, President, by order of the Board of Directors.

Q. We are getting closer to the present date. I

(Testimony of Will T. Neill.)

want to call this to the attention of Mr. Foley, and ask him whether there is any question as to the authenticity of this particular document (handing document to Mr. Foley).

Mr. Foley: You must have gotten it out of the files of the American Power & Light Company.

Mr. Slaff: I think they sent it to us.

Mr. Foley: If it was gotten from the files of the American Power & Light Company, I don't object to it on the ground of its authenticity.

Mr. Slaff: I would like to ask Mr. Laing whether he recognizes that as an authentic document.

Mr. Laing: I have no question about its being authentic.

By Mr. Slaff:

Q. Now, Mr. Neill, I ask you whether or not, in that report signed by Mr. Aller, and sent to the stockholders of the American Power & Light Company, the following is stated:

"The amounts placed on the books of certain of American Power & Light Company subsidiaries as representing the values of the plants acquired at the time of acquisition by these subsidiaries were substantially greater than the cost to the American of the individual properties acquired."

Mr. Laing: I object to the question. I am not [616] objecting to the competency of the evidence that such a statement was made, but to the materiality or relevancy in this proceeding, for the

(Testimony of Will T. Neill.)

simple reason, in this proceeding, it is admitted that there was a greater cost to the Pacific in the 1910 transaction than the cost to American. It seems to me that is all we are concerned with in this proceeding, so far as the American Power & Light Company is concerned.

Trial Examiner: There being no objection to the document from which Mr. Neill has been asked to read, or which he has been asked to verify as to content in the document; that is, as to whether or not it appears in the document; and, for the purpose as stated by Mr. Slaff at the time the other offer was made, the Examiner is inclined to overrule the objection. [617]

Mr. Foley: This is probably an appropriate time to request that when objections made by Mr. Laing on behalf of Pacific Power & Light Company apply likewise to the American Power & Light Company, unless we indicate to the contrary; that we have the same exception that he has. I think it will save a lot of time.

Trial Examiner: In other words, it will be understood that you join in the objection, Mr. Foley, as representing the American Power & Light?

Mr. Slaff: Sure; that is all right.

Mr. Foley: Unless we indicate to the contrary.

Trial Examiner: Yes, it will be so understood.

By Mr. Slaff:

Q. Does the statement appear, as I read it in that letter to the stockholders, sent by Mr. Aller, who was president, by order of the Board of Direc-

(Testimony of Will T. Neill.)

tors of American Power & Light Company on July 23, 1941? A. It does.

Q. Now, in connection with your conclusion, as you have stated it here, as to whether or not the particular transaction at the opening of Pacific's books constituted a write-up or not, as you understand the term in the System of Accounts, I should like to discuss with you some statements which may serve as a point from which our discussion can be oriented. I want to call your attention to the following [618] statement, which is made in the appendix to the report of the Committee on Corporate Finance of the National Association of Railroad Utility Commissioners for the year 1940, the appendix being a discussion entitled, "Financing the Utility Property Account, by Judge Healy, of the Securities and Exchange Commission," I want to call your attention to the statement made at page 7 of that appendix, and I would like to know, first, whether you agree with that particular statement which is stated there:

"In its simplest and boldest form, a write-up consists of marking up the figures at which assets are carried on books of account to higher figures."

I take it you agree with that, because I understand that to be the essence of your interpretation; is that right? A. I believe that is right.

Q. Now, the Judge's statement there continues as follows:

"But the same result may be, and has been, obtained in a more subtle manner. This was par-

(Testimony of Will T. Neill.)

ticularly so where holding companies were concerned. Often a write-up is created by causing one company to convey its assets to another company at a price in excess of the figure at which they were bought by the selling company, both companies at the time of the transfer being subject to common control."

Now, with respect to that statement, would you view that [619] transaction,—that type of transaction, as essentially the accomplishment of the same result as what you call a write-up, but in a more subtle manner?

A. Would you mind reading it again for me?

Q. Surely. I think I have another copy here, Mr. Neill, and perhaps you,——

A. (Interposing) I have never seen it.

(Counsel handed a paper to the witness.)

A. (Resumed) Well, I think, as I said some while back in my testimony, the whole thing gets back to the question of the definition of a write-up. As I have understood it, the first quotation which you read, and which I agreed to, covers my idea of a write-up. It is obvious, and we have shown that in our particular case, there was a substantial difference between what we considered to be cost to Pacific and the cost to American. It is set up in bold type in our exhibits. The question settles down to one of opinion as to whether this write-up should go into 107 Account or whether it should stay, as we have put it, in 100.5.

Q. And, of course, what I am interested in getting

(Testimony of Will T. Neill.)

here into the record is your opinion as to the ultimate conclusion and as to the factors which go in to make up your ultimate conclusion, and that is why I have asked you whether it is not a fact, as pointed out in this last quotation from Judge Healy that I read you, that the same result that is ob- [620] tained under the circumstances that you call write-up, may be, and often have been, obtained in a somewhat more subtle manner; namely, the interposition of another corporate entity?

A. Well, I do not seem to be able to get away from my simple definition of a write-up, and in this particular case the question is as to whether this difference between cost to Pacific and cost to American should be defined as a write-up and put in Account 107, or, as an Acquisition Adjustment, in 100.5.

Q. Well, let me put it in terms of Pacific itself. You have testified that if Pacific had gone out and bought these properties at exactly the same prices; that the Pacific had been organized by American and had gone out and bought the properties at exactly the same prices that American paid and the same vendors and at the same time, and then in July of 1910 had recorded those properties on its books at a figure of \$10,900,000, that would plainly be a write-up as far as you are concerned; right?

A. Yes, that would go into 107. I think the situation,—I think that in the situation as it occurred, my opinion is that this difference between Pacific and American cost should go into 100.5, because it is the difference between the cost to Pacific,—part

(Testimony of Will T. Neill.)

of the difference between the cost to Pacific and original cost.

Q. Surely. [621]

A. Now, the only question is one of ultimate determination by, perhaps through litigation, eventually as to where it would go; whether it should go into 107 or 100.5. There is no question, as I understand it, about the fact that there was a difference between cost to Pacific and cost to American.

Q. All right. Now, if such a transaction as I have described in this last question, which contained those assumptions, if that transaction would be a write-up, in your judgment, would you tell us what essential difference, what difference of substance there is between that transaction and the transaction which did occur at the inception of the Pacific's history?

A. Well, I think in cases of this kind, whether we call it write-up or by some other term, as I see it, the recorded cost to Pacific, and I still think it represented what the directors at the time had in mind as to the value of the property as to their judgment of the value of the property—

Q. Well, let's assume in the first hypothesis that I gave you, the Pacific had been organized in 1909 and had gone out and bought the properties at the prices that American bought it for; suppose having done that, the Board of Directors of Pacific then met on July 23, 1910, and decided that the value of the property which they had bought as at [622] July 1, 1910, was \$10,900,000, and they proceed

(Testimony of Will T. Neill.)

to record that amount on their books in their plant account, would you call that a write-up?

A. That was when they bought the property direct?

Q. Yes.

A. Yes, that would be my understanding of a write-up.

Q. Yes; so that the factor of the exercise of judgment by the directors as to value of the property at a given time, that is not the determining factor of whether or not you consider a transaction to be a write-up? A. Will you state it——

Q. (Interposing) If it is not clear to you when it is read, I will be glad to—Mr. Reporter, will you read the question, please?

(The last question was read aloud by the reporter as above recorded.)

A. Well as I say, there are two different situations; one the write-up which we have discussed would be a write-up on Pacific's books, an asset already recorded,—recorded on Pacific's books at an increase to a higher value, that, I say, is a write-up, according to my understanding of a write-up. The Pacific transaction, the one we are discussing, fundamentally, is one on which the increase in the value of the asset—that is, the value of the asset had never before been placed on Pacific's books, and it was put on there as a new entry. As I see it, that is the value based on the judgment of the Directors.

(Testimony of Will T. Neill.)

Q. Well,— A. I think that is all.

Q. Well, it is this last factor of value determined by the Board of Directors that I am trying to either eliminate from the determination of whether or not a transaction is a writeup, or included, as you see fit; but I understood you to say that the factor of valuation by the Board of Directors, that is not the factor which determines whether or not a transaction is a writeup; is that correct? In other words, in your situation where the—the assumed situation where Pacific have bought these properties themselves originally from the vendors, and then the Directors, in the exercise of their very best judgment, in July, 1910, independently, and all that, had revalued the property upward and recorded that revaluation on their books; that would be a writeup as you see it? A. Yes.

Q. So that the factor of the exercise of judgment as to valuation of the property by the Directors in the actual transaction that did occur, even if they did exercise such judgment, that factor is not of consequence in the determination of whether or not this was a writeup, in your view; is that correct?

A. Well, I don't know whether I have made myself plain or not in distinguishing between the hypothetical [624] situation and the one which actually occurred.

Q. Well, let me put it this way, if I may, Mr. Neill: What are the differences which, in your judgment, distinguish one transaction from the other

(Testimony of Will T. Neill.)

that would cause you to call one a writeup where you don't call the other one a writeup?

A. Well, as I see it, it is just a question, in one case, the hypothetical case, the increase in asset value as placed on its own books by a hypothetical Pacific Company after it had been originally recorded there at the lower value; in the other case, the original entry of \$10,900,000 was made on the Pacific books and, as far as I can see, represented cost to Pacific.

Q. Now, is there, in your judgment, any difference of substance in those two transactions?

A. That is between the hypothetical case where the Directors make the writeup, after having purchased the property after they have recorded their asset value, and at one time later they decided, perhaps, that their judgment was bad, and that the asset had a greater value, so they increase the value on their books?

Q. Yes.

A. I think, in substance, it is a similar situation.

Q. Now, so that if the first situation—the hypothetical situation—which we have been discussing, is conceded to be a write-up, we can say that essentially the [625] same result is achieved and essentially the same transaction is carried through by the type of transaction which actually occurred and which we are discussing—the fundamental transaction which we are discussing?

A. Well, the result was the same.

(Testimony of Will T. Neill.)

Q. And the transaction, in substance, is the same, is it not?

A. Well, as I see it, in both cases there is a recognition of what in the judgment of the Directors in both cases is asset value. They came out in the end in both of books the same with \$10,900,000. The writeup in the hypothetical case having been placed upon the books of Pacific Company in the hypothetical circumstances by Pacific; in the other case the cost to Pacific first recorded on Pacific books containing allowance for the same value.

Q. So that it is a fair statement, is it not, that the substance of the two transactions that we are discussing is the same?

A. Well, the result is exactly the same. It seems to me——

Q. (Interposing) I think perhaps we are in agreement. *They* are just two ways of doing the same thing; right?

A. I was going to say that the question is simply one, after the facts are all laid out, whether this excess of Pacific's recorded cost over cost to American should be in [626] Account 107, or in Account 100.5.

Q. Sure. That is the ultimate determination to be made, and in order to assist in the determination——

A. (interposing) I think it should go in 100.5. Of course, there is where the difference of opinion comes in that we are discussing today.

(Testimony of Will T. Neill.)

Q. Certainly. And as I say, in order to assist in an ultimate conclusion, I want to get your view into the record as fully as it is deemed necessary in this particular case as to the two types of transactions. And if I may repeat, then, those two transactions are just different ways of accomplishing the same result; right?

A. They come out with the same end result, yes.

Q. Surely. Then, that statement that I read to you some time ago of Judge Healy that the same result, may be and has been attained in a more subtle manner, and so on. That statement is essentially a correct statement, is it not, in your judgment?

A. Well, I think we all agreed, of course, that the result is just the same; but I might not agree with the Judge's wording here.

Q. Yes. I can see where you might take exception, particularly, where he says "often a writeup was created" in your interpretation of that; but essentially what he says there—— [627]

A. (interposing) I think you will come out in the same end result in either of the hypothetical cases, or the case which we have been discussing, for instance.

Q. Yes. Now, then, I want to call your attention—I don't think we need concern ourselves with the rest of that paragraph, although there is some awfully good language in there—I want to call your attention to the following paragraph, which reads as follows; or a part which reads as follows:

"The writeup——"

(Testimony of Will T. Neill.)

A. (interposing) May I have the page, please?

Q. Yes. It is at the bottom of the next full paragraph, Mr. Neill.

“The writeups were then used to balance or create contra-credits to surplus accounts, against which dividends could be charged or against which items could be charged that should have been charged elsewhere, or to balance the issue of securities, either to public or to holding company, which then proceeded to issue and sell to the public those securities against that.”

Now, using “writeup” in the sense in which the Judge used it in that preceding paragraph there, and which we have discussed, is that a fair statement of what was done in the utility industry in the past?

A. I don't think I can answer that.

Q. Now, take the case—— [628]

A. (interposing) It is my——

Q. Excuse me. Go ahead.

A. I spoke this morning of the fact that I am not a professional accountant; it is only so far in accounting that I can go.

Q. Well, take—had you finished your answer?

A. No. I think, before answering that question, it would take me a considerable amount of time to study the thinking of the Judge because, as I say, I am not grounded in the fundamental principles of accounting.

Q. Well, let's confine ourselves, then, to a particular transaction that took place at the instruc-

(Testimony of Will T. Neill.)

tion of the Pacific; and using the term "writeup" in the sense in which the Judge used it there, it is a fact that that writeup, or whatever you choose to call it, was used to balance the issue of securities to the holding company; isn't that so?

A. Yes, the securities and the valuation of the property that belonged to the Pacific books and other assets and liabilities. Of course, those had to balance up; I can see that. [629]

Q. So, at least, in that statement, we had summarized by Judge Healy the transaction, or the nub of the transaction, that occurred with respect to issuance of securities, at the very inception of the Pacific; right?

A. If the simple interpretation of that paragraph is as stated in our last question and answer, I would agree with you as to the balancing of the securities against property accounts.

Q. Might I have that read, Mr. Reporter? Will you go back, please, Mr. Reporter, to my previous question?

(Whereupon, the reporter read as follows: "Question: Well, let's confine ourselves, then, to a particular transaction that took place at the instruction of the Pacific; and using the term "writeup" in the sense in which the Judge used it there, it is a fact that that write-up, or whatever you choose to call it, was used to balance the issue of securities to the holding company; isn't that so? Answer: Yes. the securities and the valuation of the property

(Testimony of Will T. Neill.)

that belonged to the Pacific books on other assets and liabilities. Of course, those had to balance up; I can see that. Question: So, at least, in that statement, we had summarized by Judge Healy the transaction, or the nub of the transaction, that occurred with respect to issuance of securities, at the very inception of the Pacific; right? Answer: If the simple interpretation of that paragraph is [630] "as stated in our last question and answer, I would agree with you as to the balancing of securities against property accounts.")

By Mr. Slaff:

Q. I am not entirely clear, Mr. Neill, by what you mean by your last answer with the qualification that you have attached to it.

A. I was not attempting to qualify the thing. Maybe we had better have it read again and listen to it again.

(Whereupon the reporter read as follows: "Answer: If the simple interpretation of that paragraph is as stated in our last question and answer, I would agree with you as to the balancing of the securities against property accounts.")

A. I am inclined to agree with you,—I though I could agree with you,—that when they set up these values on their books and issued the securities for them with other assets and liabilities, they have to balance up.

Q. Sure. And in that Exhibit No. 32, which we put into evidence this afternoon, being the night letter from Simpson, Thacher & Bartlett to Mr.

(Testimony of Will T. Neill.)

Weathers, it is apparent, is it not, that the capitalization and the securities to be issued by Pacific had been decided by American at the creation, or prior to the creation, of Pacific?

A. Well, I think I agreed that they had been brought to a pretty definite conclusion by the time the Pacific was [631] organized, as to the various factors involved in the situation.

Q. Just one other thing which I would like to discuss with you again,—it hurts me to pass up several of these very nice portions of this, but we want to get along. Towards the end of the appendix there,—I don't know whether you have to go through it, Mr. Neill. I will give you the page. There is a statement,—this statement:

“Proper accounting is an indispensable adjunct to a sensible system of financing, just as poor accounting in the past has been an indispensable colleague of reckless financing.”

I take it you would agree with that generalization on the importance of proper accounting and utility financing, would you not?

A. Well, I would agree that proper accounting is very desirable. The rest of the statement is an opinion. Of course, I would disagree very heartily as to its implication.

Q. Well, I don't want to read any implications into this statement, or into any agreement of yours with it. Let's take the first part of it.

“Proper accounting is an indispensable adjunct to a sensible system of financing.”

(Testimony of Will T. Neill.)

Is there anything you find to—— [632]

A. (Interposing) That is what I was agreeing with you on.

Q. All right. Now, then, let's take the latter part of the sentence:

“Just as poor accounting in the past has been an indispensable colleague to reckless financing.”

Isn't that——

A. (Interposing) No, I could not go on that.

Q. Do you mean they were able to get along; that they were able,—those who did go in for reckless financing were able to go in for it with good accounting?

A. No, I didn't mean to say that. I think that is just the expression of opinion, which I don't know whether it is justified or not. I would make no expression of my own opinion concerning that last part of the statement. The first part of it regarding proper accounting is all right.

Mr. Laing: I take it, Mr. Neill, you think there are lots of things besides poor bookkeeping that are responsible for reckless financing?

The Witness: Oh, yes.

By Mr. Slaff:

Q. I am sure of that, but would it have been possible, Mr. Neill, to indulge in the reckless financing that was indulged in in those cases where it did exist in the past in [633] the utility industry, without poor accounting?

A. Well, I do not think I am able to express an opinion on that myself.

(Testimony of Will T. Neill.)

Q. Well, what interests me is the way you express an opinion for Mr. Laing right off like that on the same subject; but you can't express one for me. Let me put it again. Without going into the industry or the history of the industry, particularly, we know that in the past there have been instances of reckless financing; isn't that so?

A. Speaking generally, yes.

Q. Yes. And wouldn't you agree that it would be pretty difficult to carry that out if the accounting,—if the books of the companies involved and the financial and the balance sheets and the statements,—the financial statements, for instance, had been characterized by good, sound accounting?

A. Well, the reason I am hesitating is I was trying to get the connection with the accounting with the instances of reckless financing. Of course, reckless financing, I suppose, in those cases where there was such, is set up on the books.

Q. They were what purported to be balance sheets and what purported to be income statements to support the financing; right?

A. It might have been good accounting as far as purely [634] technical accounts is concerned, but not showing enough of the actual facts; that is what I have in mind.

Q. Surely.

A. Well, I think I can go with you on that. [635]

Mr. Laing: Mr. Slaff, Mr. Neill and I got some information you asked to check on last night.

(Testimony of Will T. Neill.)

Mr. Staff: Yes, if you will be good enough, Mr. Laing. Whereupon.

WILL T. NEILL

called as a witness on behalf of the Pacific Power & Light Company, having been previously sworn, resumed the stand and testified further as follows:

Further Direct Examination

By Mr. Laing:

Q. Mr. Neill, in the transcript at page 564, reference was made to Mr. Farrar's connection with the Electric Bond and Share Company in 1926. Did you find out anything [637] further about Mr. Farrar, Mr. Neill?

A. Yes. Mr. Farrar has never been an officer or director of Pacific. For many years he was an important officer of Electric Bond & Share Company in connection with the marketing by that company of bonds and other securities with the affiliated holding and operating companies.

Q. You were asked, I think, at page 556, whether Mr. Groesbeck was President of American in 1924.

A. We found an old directory and determined that Mr. Groesbeck was President of American Power & Light Company in 1924. The probability is that he assumed that position on or shortly after Mr. Sykes resignation as president, referred to in Mr. Groesbeck's letter to Mr. Talbot on June 4, 1924. Mr. Groesbeck, of course, was also an officer of Electric Bond & Share.

(Testimony of Will T. Neill.)

Q. And you were asked about the relationship of Mr. Grenier to these various companies.

A. Mr. Grenier was an operating vice-president of Pacific Power & Light Company from January 16, 1911, until some time in 1912, at which time he left Portland and joined the Bond & Share organization. He continued nominally as vice-president of Pacific thereafter until April 13, 1933, which, I believe, was the date of his death. He also served as a director in 1911 and 1912, and again from 1917 to 1933. An old directory indicates that Mr. Grenier was also vice- [638] president of the American Company in December of 1924, which indicates that he held such office while serving as a director of Pacific, and possibly also while a member of the Executive Committee of the Pacific Board, his election to which, on January 14, 1932, is referred to at page 545 of the transcript.

Q. You were asked, but I haven't the transcript reference, Mr. Neill, who were the present members of the Executive Committee of the Board of Directors of the Pacific Company.

A. We checked the records, and it appears that there has been no Executive Committee of the Board of Directors since November 9, 1933. The idea of the Executive Committee originally was to have a committee with limited authority to function when necessary in behalf of the Board on occasions between regular quarterly meetings, or when it might not be feasible to call a special meeting of the

(Testimony of Will T. Neill.)

Board. After Mr. McKee became President in 1933, and at his suggestion, the meetings of the Board have been held monthly, and the Executive Committee has been dispensed with.

If an examination is made of the records of the Pacific Company prior to 1933, I believe it will be found that all important matters, including such things as financing, acquisitions of property, etc., were passed upon directly by the Board in the first instance rather than by the Executive Com- [639] mittee.

Q. You were also asked, Mr. Neill, when Mr. Talbot first became president of the Pacific Company. Have you checked the records to see about that?

A. Yes. It appears, from checking the records, that the first president of Pacific was a resident of Augusta, Maine, who held office for two days, on June 15th and 16th, 1910, Mr. E. M. Leavitt; that the next president was Mr. E. W. Hill, of the Bond & Share organization, who was president from June 16, 1910 to August 20, 1910, and that Guy W. Talbot was elected president on August 20, 1910, and he held office until February 25, 1933.

Q. Now, I asked you about Mr. Groesbeck, did I not? A. Yes.

Q. And Mr. Grenier? A. Yes.

Q. You were asked, in the transcript at page 565, whether Mr. Hatch had anything to do with the Pacific refinancing.

A. We checked on that and find that Mr. Hatch

(Testimony of Will T. Neill.)

had nothing whatever to do with the Pacific refinancing. He did act, however, as an intermediary on the acquisitions of certain properties by Inland Company in 1925 and 1928.

Q. You were also asked whether any intermediary was employed in the 1930 Pacific refinancing, Mr. Neill. [640]

A. The record shows that, with respect to the 1930 transaction, it was carried on directly between American and Pacific, as set forth in the minutes of the Pacific Director's meeting on July 29, 1930, which is Exhibit 21.

Q. Now, at page 566 of the transcript, you were asked whether Mr. Silliman's hope of losing the discount and premiums through an intermediary was realized. What have you to say as to that?

A. In the testimony yesterday, attention,—not in the testimony yesterday,—strike that, Mr. Reporter. Attention has been called to the fact that no intermediary was used in the 1930 transaction, and as the 5% bonds were not called, but were retired at par on August 1, 1930, no premium on calling the bonds was involved. The record shows that the bond discount on the 1930 bonds was not separately taken up on Pacific's books prior to the reclassification statements, nor was the debt discount of four hundred eighty-eight thousand odd dollars on the 1910 bonds taken up on Pacific's books prior to the reclassification.

Q. With reference to page 567 of the transcript, Mr. Neill, to a wire from Mr. Silliman to Mr. Talbot,

(Testimony of Will T. Neill.)

dated December 21, 1937, concerning tentative re-financing plan referred to in that wire, suggesting that the Pacific call a Board meeting for the purpose of considering it; have you checked to see whether anything was done in connection with [641] that?

A. Yes. We checked that, and the record shows no financing was carried out pursuant to the suggestion contained in that wire, and no refinancing occurred until August 1, 1930, when the 5% bonds matured.

Mr. Laing: I think that was all that we have listed that we were asked to do.

Cross Examination (Resumed)

By Mr. Slaff:

Q. You mean by 1930, in response to your previous questions by Mr. Laing, the technique had so advanced that it was not necessary to employ an intermediary in the refinancing in order to lose the bond discount. At least, that is what it would amount to?

A. We checked the record and found that there was no intermediary in the 1930 transaction. That was a direct transaction between American and Pacific.

Q. And another way of putting the result of that transaction is that the approximately a million and a half bond discount suffered in that transaction was lost in Pacific's plant?

A. It wasn't taken up as bond discount on Pa-

(Testimony of Will T. Neill.)

cific's plant account, as such. It was in the plant account, and in the reclassification, we set it up separately.

Q. Surely. The 1930 bond discount went into the plant account [642] rather than being taken up as bond discount, and in the reclassification, you have set it up properly; right? [643]

A. I think my answer to the previous question covered that.

Q. I think so. Thank you.

Turning now to your Revised Statement G, Exhibit 17, wherein is shown the comparative balance sheets as of January 1, 1937, before and after making the adjusting entries as required by the System of Accounts, as you interpreted it; is my statement correct? A. That is correct.

Q. Now, on the balance sheet you show a total utility plant value of some \$28,768,000-odd?

A. After adjustment.

Q. And other physical property in the sum of \$2,468,000; is that correct?

A. That is right.

Q. Making a total of \$31,236,000?

A. Approximately \$31,236,000.

Q. And you show a reserve for property retirement, after adjustment, of \$2,654,000; is that right? A. That is right.

Q. Making thus a net book cost of your total utility plant and other physical property of some \$28,580,000-odd?

A. That is fixed capital, less reserve.

(Testimony of Will T. Neill.)

Q. Yes. Now, assume, Mr. Neill, that the property of the Pacific Power & Light Company had been valued by a [644] competent engineer as of December 31, 1940, who had arrived at reproduction cost of that property in the sum of \$37,450,000, as going value of that property the sum of \$3,000,000, and the depreciation in the property, \$5,700,000; making a net total of \$37,450,000; and assuming that the Board of Directors had, in meeting, come to the conclusion that that represented a fair value; and let us assume that no net additions had been made to your property between January 1, 1937 and January 1, 1941, so that we could use the figures; would you approve, under those circumstances, an entry in your Plant Account to show as the net property value in the sum of \$37,450,000 as of January 1, 1941?

A. No; I think, in that situation, the cost to the utility should be shown on the books as it is today.

Q. That, you would consider a writeup on the Company's books that you could not approve, would you not?

A. I don't think I would approve that particular kind of revaluation; that is, so far as the books of account go.

Q. Yes. We are confining ourselves to the books of account.

A. The assets today are presumably worth the \$37,450,000, less the depreciation, but the books of account show, as they should, the cost to the Pacific Company.

(Testimony of Will T. Neill.)

Q. Now, would you approve the creation of a company, if you were asked to, by the American Power & Light Company, [645] known as Pacific Power & Light No. 2, which was to take over all the property of the Pacific Power & Light Company, assume its stock, issue the same amount of preferred stock that is now outstanding in exchange for the present Pacific preferred, and issue common stock at a stated value of some \$6,000,000 more than the stated value of the present Pacific stock, and the entry into the Plant Account of Pacific No. 2 of the properties which it takes over at a net figure of the sum of \$34,750,000?

A. May I have that question read; that is rather a long question.

Q. Surely.

(Thereupon the last preceding question, referred to, was read aloud by the reporter as above recorded.)

A. Well, that is coming into something that I don't know very much about. About all I can say about that is that is hypothetical as to the present situation. As I say, I am not a professional accountant, but, as I understand, the cost to the utility is the amount that should be recorded on its books. There are undoubtedly occasions when a new company might be formed to take over valuable assets, properly so, at values in excess of what they might have been recorded on somebody else's books, where the values of those assets are

(Testimony of Will T. Neill.)

stable and well-founded. I don't know whether that is done, generally, but it seems to me that it might be done— [646] not referring to this particular situation.

Q. Well, confining ourselves to the present situation. Of course, it is a hypothetical situation, but I put the hypothetical question to you in order to get your reaction as to what you think should properly be done.

A. Well, as I said, I am not an accountant, and it is a little beyond my scope.

Q. I realize that, but they tell me you are a pretty good operating man, and I am trying to get your opinion, as an operating man who has properties, who feels a duty to the security holder and to the public, and it is from that point of view that I put that question to you.

A. As you say, I would not say I am a good operating man, but my forte is operating not financing, and I don't know anything about financing. I couldn't very well speculate on such situations such as you have outlined. [647]

Q. Of course, you are a member of the Board of the Pacific Power & Light Company?

A. Yes.

Q. And while you might not be a specialist in financing, financing problems come up before the Board?

A. Oh, yes; there have been no major ones since I have been a member of the Board.

(Testimony of Will T. Neill.)

Q. There are problems of financing to keep it running on a good, solvent basis, and those problems are not entirely removed from your ken, are they?

A. Well, situations such as you stated in your question are beyond my knowledge.

Q. You are familiar with the proposed Pacific-Inland merger? A. Yes.

Q. And you testified about it before the Federal Power Commission? A. Yes.

Q. That involves problems of consolidation and merger and various financial problems attendant thereon?

A. Well, the phase of the matter that I handled, or the phases of the matter that I handled were not on the financing end of it.

Q. But what I mean is, you are pretty well familiar with the problems involved there? [648]

A. Oh, yes; but, as I say, I am not at all familiar with, nor do I have an intimate knowledge of the broader aspects of public utility financing; that is, I do not have sufficient knowledge to do any more than speculate, which, of course, I don't want to do.

Q. I certainly don't want you to speculate, but, nevertheless, I want the opinion of a witness who has been produced by the company in this respect put on as accurately, without indulging in speculation, as it can be put on. Now, you told us, right off, with respect to the first situation I put to you, namely, the writing up of the plant account of the

(Testimony of Will T. Neill.)

present Pacific, and that you would not approve of it.

A. I don't know that I know all the aspects of such a situation, but that would be my present opinion, that the account should remain on the Company's books stated as it is on the Company's books today; that is, without regard to the total value of the assets which is today worth considerably more than is shown on the Company's books.

Q. Let us assume that all other factors remain the same, but it is suggested to you by American Power & Light Company that this Pacific No. 2 should be created and, as I have said, all the properties of Pacific No. 1 taken over, its bonds assumed, preferred issued in the same amount, common stock issued at a stated value of six million dollars more, and the properties taken into the plant account of [649] Pacific No. 2 at a net amount of six million dollars more than the present net amount on the books of the Company.—

Mr. Foley: (Interposing) You are not suggesting, Mr. Slaff, that the situation is the same today?

Mr. Slaff: What do you mean, Mr. Foley? I am sorry, I don't follow you.

Mr. Foley: You said you are assuming that Company No. 2 would take over the properties of Pacific No. 1, with all factors remaining the same; you are not relating it to the actual situation that exists today in this present territory?

Mr. Slaff: It doesn't make any difference for the purposes of my question.

(Testimony of Will T. Neill.)

Mr. Foley: It is just a hypothetical question?

Mr. Slaff: Certainly. It is a hypothetical question. I don't want to bring up any extraneous factors. Certainly, if Mr. Neill or counsel want to bring in other factors, they may do so, but that is irrelevant for the purposes of my question. I simply want to know whether the witness would approve of such an entry. I simply want to know whether the differences in the situation created by the creation of another entity, Pacific No. 2, would justify such an entry, in his opinion, or meet with his approval.

The Witness: Well, I really don't feel capable of answering the question, because of my lack of knowledge of all the factors involved. [650]

By Mr. Slaff:

Q. Do you mean that the answer which you would give after reflection on the problem would be valueless to us and to the Commission in arriving at a conclusion with reference to the problem that confronts us in this case?

A. I very definitely feel that, having had no experience in financial matters of that kind, I cannot answer the question.

Q. Well, wasn't it necessary, Mr. Neill, to consider that type of a situation in arriving at your original conclusion as to whether or not the original Pacific transaction, the actual historical transaction, was or was not a write-up?

A. I can say this, I believe: If some organization undertook, maybe for the purpose of integra-

(Testimony of Will T. Neill.)

tion or any other purpose, to take over the properties of the Pacific Company, or any other company today, they would probably take those properties over at the best price possible, based on the valuation of the assets as of today, and that might involve, in the case of the Pacific Power & Light Company, a considerably higher plant value than the Pacific now has on its books of record as recording its costs,—costs to it.

Q. Of course, you are presupposing a transaction with some outside company, and not a transaction between the American and the Pacific; you are presupposing a transaction with some other organization; isn't that so? [651]

A. Yes.

Q. That is why I put the question the way I did, to eliminate the factor of arms' length transactions. I asked you to assume, with all other factors being equal, except that the American wanted to create Pacific No. 2, under the conditions which I stated.

A. That is, as I said before, if a new company should be organized to buy this property, or any other property, I should think it would be perfectly proper for it to take the property over at the value which the new organization thought it had, and pay for it accordingly, in securities, or otherwise.

Q. Let us say that the new organization, which is Pacific No. 2, is created now by the American Power & Light Company for the purpose of taking over the identical properties which the Pacific now holds, and all the directors of the Pacific No. 2 are

(Testimony of Will T. Neill.)

employees of the American Power & Light Company, or their law firm at the present time, would you approve, or do you think it proper that such a transfer of properties should be made to Pacific No. 2 and an entry into the plant account of Pacific No. 2 of some \$6,000,000 in excess of the amount now recorded in the plant account of the Pacific as it exists today?

A. That is the part of the question I don't feel capable of answering. I would be glad to, if I knew. But [652] that situation, as I see it, insofar as my part of it is concerned, would require careful study and consultation with somebody that was expert on these matters, both as to their actual operation and with respect to the regulations that pertain to it, and all other phases of it. I am trying to answer the question the best way I can, and I am not trying to avoid it.

Q. Tell me this, then: Would you recommend, in the Inland merger, to take over the Inland properties on the books of the Pacific at the present day reproduction cost of those properties, or on the basis of the cost on the Inland's books?

A. Well, that has been set up to come over, if it comes over, at the cost on Inland's books, with no change in the valuation of the properties.

Q. Well, why shouldn't it come over at reproduction cost, if that is higher than the cost on Inland's books?

A. Well, of course, in that case, the Inland is a wholly owned subsidiary of the Pacific, and I think

(Testimony of Will T. Neill.)

it should come over, in that case, at the cost to Inland.

Q. Well, what is the reason in back of your conclusion that, because it is a wholly owned subsidiary, the property should come over at the cost to Inland?

A. Well, I think I am doing a little bit of speculating, and I should not be doing it, because I am not familiar [653] with all the aspects of the problem. I have gone as far as I can.

Q. That is why I brought the problem back, Mr. Neill, to the Inland-Pacific merger situation, because, I assume that that has been the subject of discussion in your company, in which you are concerned, over a period of a good many years?

A. There has not been any discussion about bringing it over to the Pacific except at the cost shown on the Inland's books.

Q. That, I assume, was fundamental, and so considered by the Board?

A. That particular discussion was never entered into, and that is why I am lost in the hypothetical situation.

Q. The Inland illustration is a very concrete illustration, and that is why I wanted to discuss it with you; but, as I told you before, I don't want you to speculate and I don't want you to put on the record any statement that you feel you have been compelled to or prodded into giving; I want your mature judgment; but, again, I put the question to you, and if you feel you cannot answer it, of course, you will tell me so; if you can tell us

(Testimony of Will T. Neill.)

the reason back of the conclusion that was accepted as fundamental, that the Inland properties should come over to the Pacific at cost to Inland rather than at reduction cost, or any other fact?

A. As I say, it has never been discussed, and I have never given it any thought. [654]

Q. Would you make any distinction between the transfer of property from a wholly-owned subsidiary to the parent and the transfer of property between two wholly-owned subsidiaries of the same parent?

A. Any distinction in what respect?

Q. In connection with the amounts which should be recorded in the plant accounts as the result of such transaction?

A. Well, I do not know. As it appears to me in a transaction of that kind, it is entirely proper to put on the—that is, to put the properties on the new company's books at their value as determined at the time. Now, as to the property of the two related companies, I don't know about that. That is involved in—I personally can see no practical reason why the values of a new company of any kind should not reflect the true value of the asset at the time of the acquisition.

Mr. Slaff: May I have the first part of that answer, Mr. Reporter?

(Thereupon, the answer referred to was read aloud by the reporter as above recorded.)

By Mr. Slaff:

Q. I don't know whether you specifically an-

(Testimony of Will T. Neill.)

swered the question which I put to you, Mr. Neill, and I would like to put it again. [655]

With respect to the amounts which should be recorded on the books of the acquiring company, do you make any distinction between a transaction in which a wholly-owned subsidiary which sells property to its parent and the transaction in which one wholly-owned subsidiary of the parents sells property to another wholly-owned subsidiary of the same parent?

A. May I have that question read, please?

(Thereupon, the question referred to was read aloud by the reporter as above recorded.)

A. (continuing) Well, I don't know whether I can answer that or not. As I see it, it should be perfectly proper to put the value of the asset at the time of the transaction on the new company's books—that is, the value at the time of the transaction.

By Mr. Slaff:

Q. Well, is it perfectly proper, then, in your judgment, to put the value of the assets of Inland on the books of Pacific, at the time of the consummation of the merger between Pacific and Inland?

A. I don't know, Mr. Slaff.

Q. I asked you that question, Mr. Neill, of course, in the light of the answer of yours that immediately precedes that, where you made a generalization which led me to believe that you were stating that in general, as a generalization, you

(Testimony of Will T. Neill.)

approve of such action, and that is why I want to relate [656] it specifically to a transaction with which you are familiar and a transaction which specifically affects your Company.

A. I am getting into the phase of the situation with which I say I don't have enough experience to deal with it. I am trying to give you the answer.

Q. Surely; I realize that, Mr. Neill.

A. At the present time that is all I can say; I just don't know.

Q. Now then, you have said, as I recollect your earlier answer, that the property of Inland should come over to Pacific at the cost on Inland's books, because Inland is a wholly-owned subsidiary of Pacific, and that has been accepted as fundamental by you and your company people in considering the problem. It is so fundamental that you never even went into the reasons back of it.

Now, I ask you whether your conclusion would be the same if American owned all the stock of Inland, instead of Pacific, or would your conclusion in that respect be different?

A. Well, with respect to the Inland transaction of which I spoke before, of course, as I said, the question of bringing it onto Pacific's books at some value representing its present worth, it has never been discussed as compared with the proposition of bringing it on the Pacific's books at its recorded cost to Inland. It is my opinion, if I did express it as to that fact, that it probably should come [657]

(Testimony of Will T. Neill.)

to Pacific at its recorded cost; that was merely based on the fact that that was the plan, and the other possibility was not discussed.

Q. Well, can you see any distinction as to the affecting the amount at which the Inland property should come over to Pacific's books? Can you see any distinction in the situation where Pacific owns all the common stock of Inland, or American owns all the common stock of Inland?

A. Well, I think it would still be a case of what the value of the assets are at the time of the transaction.

Q. I am afraid I am not entirely clear as to your answers, Mr. Neill; so let us see if we can clear that up. As I understand it, with respect to the situation as it exists, and that is Pacific owning all the common stock of Inland, you say the property should come over from Pacific—from Inland to Pacific, at cost on Inland's books; right?

A. Well, that is the way it is coming. You say it should come. Now, the question where I can't follow you, of course, is whether it would be proper in a situation of that kind to take it on the Pacific's books at increased values based on the present worth of the assets.

Q. You don't think the Board is recommending an impropriety, or action that is improper in the judgment of the Board when it directs that the property of Inland, when it comes over, come over at cost on Inland's books, do you? [658]

A. No, that wasn't the question. The statement

(Testimony of Will T. Neill.)

I made was with respect to bringing it over at a higher value.

Q. Well now, your Board has, as I understand it, assumed as fundamental the property of Inland is to come over to Pacific at cost on Inland's books; is that correct?

A. That is the basis upon which the thing has been decided, yes. [659]

Q. Yes.

A. That is, that two properties should be merged just as they stand on the books.

Q. Now, can you see any distinction be made in the cost at which such property should come over to the books of Pacific between the situation where Pacific is the sole owner of all common stock of Inland, and the situation where American is the sole owner of all the common stock of Inland?

A. Well, there might be a difference in the nature of the properties, of course. Take in the case of Inland and Pacific, the whole set-up of the properties is different. They are practically one property. I don't get your—

Q. (Interposing) I don't think you answered the question as I put it to you. Again, assume all other factors are equal and the properties are operated in the same manner as they are today; all other factors are equal except that American, instead of Pacific, say, owns all the common stock of Inland. Now, would that factor make any difference in your mind as to the amount at which the

(Testimony of Will T. Neill.)

properties of Inland should come over to the books of Pacific?

A. Well, I don't think it would.

Q. All right. Now, if the Inland's property was brought over to Pacific's books at reproduction cost, or some other value higher than the cost on Inland's books, would you consider that a write-up?

[660]

A. That is bringing the property from Inland to Pacific at a higher value than it is now set up on Inland's books?

Q. That is right.

A. According to my understanding of the write-up, again, as we discussed it yesterday, I think, according to my fundamental definition, that would not be a write-up.

Q. That is why I put this case, to see whether there might be some variance in your thinking from that fundamental definition which you gave us yesterday, and I am asking you now whether you consider that such a transaction is a write-up.

A. It would be accounted for, the way I would look at it, as a part of your 100.5 Acquisition Adjustment on Pacific's books.

Q. Well, let's see. Do I understand, then, that you would not regard such a transaction as a write-up?

Mr. Laing Are you asking him, Mr. Slaff, in the hypothetical case, or in the case where the Pacific owns the Inland stock first?

Mr. Slaff: This is the case where the Pacific

(Testimony of Will T. Neill.)

owns the Inland stock and the property comes over on the Pacific's books at a value higher than the cost and the amount recorded on Inland's books.

A. Well, the question there as to the complete owner- [661] ship of Inland as to all debt and securities by Pacific,—my hesitation is the difficulty I have in getting away from my fundamental definition of a writ-up. Mr. Slaff, would you mind stating your question again for me?

Q. Surely. As conditions actually exist, if the property of Inland should come over to the books of Pacific at a value higher than the cost to Inland as recorded on Inland's books, and that property should be entered on Pacific's books at that higher value, would you consider that transaction a write-up?

A. That might be a write-up, in view of the complete ownership, as I started to say a while ago, at present of all of the Inland's securities and debt by Pacific.

Q. Now, I think you have told us earlier than you made no distinction between property with respect to the price or the amount at which property should be recorded as result of the transaction, you made no distinction between the situation where the sale was from a wholly owned sub to the parent, and the situation where the sale was from one wholly owned sub of the parent to another wholly owned sub, of the same parent. Now, in the light of that situation and statement of yours, as I understand it, assuming that all the securities of Inland

(Testimony of Will T. Neill.)

were owned by American Power & Light Company, and the property of Inland went over to Pacific at a value higher than the cost to Inland, would you say also [662] that in your view that transaction might be called a write-up?

A. That is, American owns all of the securities at the time of the transaction?

Q. That is right.

A. Yes, I think it might.

Q. I show you a photostatic copy of an exhibit of an exhibit that went into evidence in the Pacific-Inland case before the Commission, Docket IT-5469, being Exhibit No. 8, and ask you if you can identify that for us, Mr. Neill.

A. I believe this is a copy of that exhibit; I have seen it.

Q. That exhibit was prepared, was it not, by Mr. A. D. Root, at the request, as I understand it, of some of the staff of the Commission in that case?

A. I believe it was.

Q. Yes. And will you identify Mr. A. D. Root for the record, please?

A. I don't know exactly what Mr. Root's position is. He is an accountant in the New York organization, either of Electric Bond & Share, I think, —I would not be sure as to that; he is one of the New York men.

Q. Well, when you say he is an accountant, and if we let that stand as such in the record, it perhaps might not exactly do justice to Mr. Root's position, Mr. Neill. He is one of the chief account-

(Testimony of Will T. Neill.)

ing officers, is he not, of Electric [663] Bond & Share or Ebasco?

A. I do not know what his particular position is, but he is, of course, an accountant; I know that.

Q. Surely.

A. But he prepared the exhibit, and he has given testimony, I believe, in that case.

Q. I should think by now almost this Commission, or any regulatory commission, should be able to take judicial notice of Mr. Root's position.

A. I have never known what his title is or what position he holds.

Mr. Slaff: I should like to have this document, which is a photostatic copy of Exhibit No. 8, in Docket No. IT-5469, before the Federal Power Commission, marked for identification as an exhibit and received in evidence.

Trial Examiner: It may be marked for identification as Exhibit No. 33. Mr. Slaff, do you have other copies?

Mr. Slaff: I don't have them now, Mr. Examiner.

Trial Examiner: I wonder if you can furnish copies, inasmuch as that is in the formal files of the Commission.

Mr. Slaff: Well, I have a copy for the files, and I think perhaps it might be better to have it in the record. I will furnish additional copies for counsel and your Honor.

Trial Examiner: Very well. It will be marked for identification as Exhibit No. 33. [664]

(Testimony of Will T. Neill.)

(The document referred to was marked Exhibit No. 33 for identification.)

Trial Examiner: Is there any objection, Mr. Laing?

Mr. Laing: I have no objection to its being received in evidence as a correct copy of an exhibit as prepared and submitted by Mr. Root at the request of the staff of the Federal Power Commission in the merger hearing. I am not objecting to its acceptance, but I want to make clear that I do not feel that our own company is bound by the figures or the analyses that were made in this exhibit. I mean, it is not offered as a document as coming from the Pacific Power & Light Company.

Trial Examiner: But you do not object to the offer?

Mr. Liang: No; with the limited scope of its application.

Trial Examiner: Very well. Exhibit 33 will be received.

(Exhibit No. 33 was received in evidence.)

(Testimony of Will T. Neill.)

HEARING EXHIBIT No. 33

INLAND POWER & LIGHT COMPANY

STATEMENT OF ORIGINAL COST OF PROPERTIES OWNED MARCH 31, 1937

Ariel Hydro Electric Development.

Cash expenditures for construction incurred by:

Northwestern Electric Company.....	\$ 484,035.01
Phoenix Utility Company.....	7,282,208.90
Inland Power & Light Company.....	1,068,832.48
	<hr/>

Total cash constructed cost of Ariel Hydro-electric project now on books of Inland Power & Light Company.....
 This is a Federal License project which has been audited by FPC but final costs have not yet been approved.

\$ 8,835,076.39

Yale and Upper Lewis River power sites

Cash expenditures incurred by:

Northwestern Electric Company.....	\$ 467,137.42
Inland Power & Light Company.....	210,826.94
	<hr/>

Total—now on books of Inland Power & Light Company

\$ 677,964.36

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

Inland Power & Light Company—(Continued)

Wallowa Falls Project

Costs audited and approved by Federal Power Commission \$ 102,293.97
 Disallowed by FPC..... 131.62
 Additions—not audited by FPC..... 12.93

\$ 102,438.52

85,684.16

Total.....

Transmission line—cash.. expenditures made by Inland Power & Light Co.....

Total original cost of property—per books of Inland Power & Light Company.....
 Plant account—March 31, 1937.....

\$ 9,701,163.43

10,036,189.53

Difference

represents book cost of Cove Hydro-electric plant

Brought Forward

\$ 335,026.10

This Cove plant was constructed by the Cove Power Company—whose books are not in possession of Inland Power & Light Company.

\$ 335,026.10

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

Inland Power & Light Company—(Continued)

The Cove Power Company sold this plant along with other properties to Bend Water Light & Power Company. This Company's stock was acquired by American Power & Light Co. and its name changed to Deschutes Power & Light Company. American then sold the stock of Deschutes to Inland. Inland subsequently acquired all of Deschutes physical properties including the Cove plant and subsequently sold all of such properties except the Cove plant to Pacific Power & Light Company.

From the books of Deschutes Power & Light Co. and from an old appraisal, it appears that the cost of the Cove plant might have been about.....

\$	150,000.00
\$	185,026.10

Leaving an excess on Inland's books against this plant of.....

Bend Water, Light & Power Company (by change of name later becoming Deschutes Power & Light Company) acquired ownership of Cove plant as part of property of Deschutes Power Company.

(Testimony of Will T. Neill.)

INLAND POWER & LIGHT COMPANY

	Write-up as computed by FTC	Write-up as correctly computed
1. Under agreement in 1926 with L. B. Hatch (who was an intermediary acting for American Power & Light Company) Inland Power & Light Company acquired certain properties and securities from American Power & Light Company and placed such properties on its books in the amount of.....	\$ 3,195,369.27	\$ 3,195,369.27
The cost of these properties and securities to American Power & Light Company was.....	1,882,002.22	1,882,002.22
Excess value of properties and securities placed on books of Inland Power & Light Co. over cost to American Power & Light Company	\$ 1,313,367.05	\$ 1,313,367.05
2. Under agreement with L. B. Hatch dated July 31, 1928, Inland Power & Light Company purchased certain properties from American Power & Light Co. and placed same on its books in the amount of.....	\$ 3,264,927.78	\$ 3,264,927.78
Book value of fixed capital of predecessor companies at June 30, 1928.....	2,350,343.83	2,350,343.83
Excess	\$ 914,583.95	\$ 914,583.95

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

Inland Power & Light Company—(Continued)

	Write-up as correctly computed	Write-up as computed by FTC
Less excess amount paid by American Power & Light over book value of common stocks of		
Deschutes Companies	\$ 556,289.52	\$ 531,365.60
Grangeville Electric Lt. & Pr. Co.....		<div> <div>Not shown in FTC report</div> <div>}</div> </div>
Sherman Electric Co.....		
Yakima Central Heating Co.....	358,294.43	
Enterprise Electric Company.....		
Total Deduction	\$ 914,583.95	\$ 531,365.60
Excess in July 31, 1928 transaction.....		383,218.35
3. Total excess—1/2	\$ 1,313,367.05	\$ 1,696,585.40
4. Disposition excess:		
Amount of excess transferred to:		
The Washington Water Power Co. (see pages 3 and 4 attached)	988,521.78	
Amount of excess now remaining on books of Inland Power & Light Company (est.).....	185,026.10	
(See Inland original cost statement)		
Total.....	\$ 1,173,547.88	

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

Inland Power & Light Company—(Continued)

	Write-up as correctly computed
Since all the remaining properties of Inland Power & Light Company involved in creation of excess were in 1930 transferred to Pacific Power & Light Company, the re- mainder of the excess, or.....	\$ 139,819.17
was transferred to the plant account of Pacific Power & Light Company. (See page 5 attached)	
Total excess accounted for.....	\$1,313,367.05

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

THE WASHINGTON WATER POWER COMPANY

1. On February 11, 1930, The Washington Water Power Company purchased, under an agreement with American Power & Light Company—among other things—certain properties then owned by Inland Power & Light Company (a 100% owned subsidiary of American Power & Light Company)

The Federal Trade Commission on page 97 of Senate Document 92, part 29, computed a write-up of The Washington Water Power Company in the February 11, 1930 transaction, as follows:

Amount placed in plant account of The Washington Water Power Co. for properties purchased.....

Amount in predecessor's plant for same properties:

Kootenai Power Co.....	\$ 239,272.22
Consumers Company	290,232.18
Inland Pr. & Lt. Co.....	3,551,000.00

Total.....\$4,080,504.40

Less Retirement Reserves—

Kootenai & Consumers Co.....	292,416.37
------------------------------	------------

Net book values.....

\$ 3,788,088.03

Write-up—as computed by FTC.....

\$ 2,516,614.56

\$ 6,304,702.59

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

The Washington Water Power Company—(Continued)

2. However, the Inland properties included above, amounting to \$3,551,000 had been

	American's acquisition cost or Inland's construction cost	Inland's purchased or construc- tion cost of prop- erties sold to The Washington W.P. Co.
Purchased from American by Inland		
Washington Idaho Water Lt. & Pr. Co. properties.....	\$ 1,023,147.49	\$ 2,011,669.27
Lewiston Clarkston Improvement Co. properties.....	682,295.86	682,295.86
Grangeville Electric Light properties.....		
Constructed by Inland Power & Light Co.		
Additions to above properties.....	857,034.87	857,034.87
Other properties constructed.....		
Totals for property sold by Inland to The Washington Water Power Co.....	\$ 2,562,478.22	\$ 3,551,000.00

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

The Washington Water Power Company—(Continued)

Inland's purchased or construc- tion cost of prop- erties sold to The Washington W.P.Co.	
	\$ 2,011,669.27
	1,023,147.49
	<hr/>
	\$ 988,521.78

American's
acquisition
cost or Inland's
construction cost

Thus it will be seen that Inland had acquired property from American Power & Light Company and paid American therefor (in securities).....
which properties had cost American.....

Putting an excess on Inland's books of.....
which excess was a part of the Inland Power & Light Co.
write-up found by the Federal Trade Commission.

From the above it will be further seen that this excess was passed along to The Washington Water Power Company by Inland Power & Light Co., thereby, in effect, removing it from Inland's books and placing it on The Washington Water Power Company's books.

ADR 7/16/37

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

PACIFIC POWER & LIGHT COMPANY

1. On January 1, 1926 Inland purchased certain properties and securities from American Power & Light Company

Included in such purchase was all the capital stock of:

Bend Water Light & Power Company

Deschutes Ice Company

All of the properties of these companies were sold by Inland Power & Light Company in 1930 to Pacific Power & Light Company

except

The Cove plant, which was retained by Inland.

2. The above securities had cost American Power & Light Company

The Inland paid American, for them, in securities, the sum of

\$ 858,854.73
1,183,700.00

An excess, then, on Inland's books of.....

3. It has been estimated that the Cove plant had a cost to American of approximately.....

Its book value on Inland's books is.....

\$ 150,000
335,026.10

Therefore, of the above excess of \$324,845.27, there still remains on Inland's books only.....

185,026.10

Thus, the difference, or.....

\$ 139,819.17

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

Pacific Power & Light Company—(Continued)

was transferred to Pacific Power & Light Company in the

1930 sale of properties to Pacific Power & Light Company.

1. Write-up as set forth by Federal Trade Commission on page 145 of Volume 35, of Federal Trade report:

Under agreement dated July 23, 1910, Pacific Power & Light Company issued to Weld M. Stevens (an intermediary for American Power & Light Company) the following securities:

Common stock par value.....	\$ 5,997,000.00
Preferred stock—par value.....	1,250,000.00
Bonds	3,200,000.00

\$10,447,000.00

Total.....

The above securities cost American Power & Light Company the sum of.....

4,767,572.34

Excess of par value and principal amount over cost to American Power & Light Co.....

\$ 5,679,427.66

2. Write-down—not considered by FTC:

In 1921 American Power & Light Company surrendered

—gratis—to Pacific Power & Light Company—common
stock of Pacific of a p. v. of.....

\$ 345,000.00

3. Write-up—net—after applying write-down.....

The books of predecessor companies, i.e., companies whose properties were purchased from American Power & Light Company in 1910, were not in 1910, and are not now available, so that the original cost of these properties (which cost American Power & Light Co. \$4,767,572.34) may have been more or less than such figure. So that the real excess over original cost might have been more or less than the \$5,334,427.66 above outlined.

\$ 5,334,427.66

4. From the above, it will be noted that

American Power & Light Company owned common stock of Pacific Power & Light Company as a result of the above transactions of a par value of.....

\$ 5,652,000.00

Which par value exceed American's cost of such stock by

5,334,427.66

Leaving an actual cost to American of.....

\$ 317,572.34

For the \$5,652,000 par value of Pacific Power & Light Company Common.

Brought Forward

\$ 317,572.34

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

Pacific Power & Light Company—(Continued)

5. Subsequent to July 23, 1910:

American Power & Light Company sold all the preferred stock and Bonds of Pacific Power & Light Co., which it had received in the July 23, 1910 transaction and suffered discounts and expenses in such sales as follows:

On \$1,250,000 p. v. preferred stock.....	\$ 161,500
On subsequent purchases and sales of Pacific Preferred stock	208,804.79
On \$3,200,000 Bonds.....	447,567.00
	<hr/>

Total discounts and expenses suffered by American Power & Light Co.....

\$ 817,871.79

Total

\$ 1,135,444.13

representing American Power & Light Co.'s cost of \$5,652,000 p. v. of Pacific Power & Light Co.'s common stock
(See FTC—volumes 23 & 24—part 2, page 930)

6. On July 31, 1930, American Power & Light Company turned over to Pacific Power & Light Company:

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

Pacific Power & Light Company—(Continued)

American's
cash cost of securi-
ties properties &
cash turned over to
Pacific on 7/31/30

Securities of Pacific Power & Light Co.	
1900 shares 7% 2nd Preferred stock.....	\$ 190,000
Securities of Inland Power & Light Co.	
6% Demand Note—\$1,200,000 p.a.....	1,200,000
6% Demand Note— 1,700,000 p.a.....	1,700,000
6% Demand Loans—1,430,000 p.a.....	1,430,000
Common stock —1,545,369.27 S.V.	232,002.22
Properties:	
Public Service building in Portland, Oregon.	
Constructed cost	2,186,387.29
Cash in amount of.....	10,829,000.00
Total	\$17,767,389.51
Brought Forward	\$17,767,389.51
For the above American Power & Light Company received from Pacific Power & Light Company:	

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

Pacific Power & Light Company—(Continued)

American's
cash cost of securi-
ties properties &
cash turned over to
Pacific on 7/31/30

1st Mortgage Bonds.....	\$17,000,000
\$6 Preferred Stock	500,000
Common stock non par of stated value.....	1,245,000
Total	<hr/>

\$18,745,000.00

Excess—(Assume this represents additional book cost to
Pacific Power & Light Co. of Inland P & L Common
stock)

\$ 977,610.49

American Power & Light Company sold the bonds and
stocks to investment bankers and suffered discounts and
expenses in selling same, viz:

Discount on bonds.....	\$ 1,360,000.00
Expenses of printing, stamps, etc.....	87,627.74
Commissions paid Electric Bond and Share Company....	128,750.00
Discount on Preferred stock.....	25,000.00
	<hr/>

Total expenses and discounts suffered by American
Power & Light Company (in 1930 transaction).....

\$ 1,601,377.74

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

Pacific Power & Light Company—(Continued)

SUMMARY

1. Write-up as charged by FTC.....	\$ 5,679,427.66
Deduct subsequent write-down—applying to above.....	345,000.00
	<hr/>
Net write-up per FTC adjusted.....	\$ 5,334,427.66
This write-up per FTC includes Bond discount & expense and preferred stock expense capitalized totaling.....	
2. Excess in July 31, 1930 transaction.....	977,610.49
	<hr/>
Total excess	\$ 6,312,038.15

\$817,871.79

(Testimony of Will T. Neill.)

Hearing Exhibit No. 33—(Continued)

PACIFIC POWER & LIGHT COMPANY
INLAND POWER & LIGHT COMPANY

SUMMARY OF "EXCESS" SITUATION AS IT WILL EXIST ON BOOKS OF PACIFIC POWER & LIGHT COMPANY AFTER GIVING EFFECT TO CONSOLIDATION WITH INLAND POWER & LIGHT COMPANY, AS PER ADJUSTMENTS SHOWN IN APPLICATION.

1. Plant accounts April 30, 1937—per books—before consolidation:

Pacific Power & Light Company.....	\$42,045,991.16	
Deduct amount included in above for Inland Power & Light Company		
Notes	\$7,959,700	
Stock		
(see pages 2 and 3 of Pacific P & L		
Co. write-up statement)	\$1,209,612.71	
Balance represents property of Pacific Power & Light		\$32,876,678.45
Inland Power & Light Company.....		10,035,730.77
Total		<hr/> \$42,912,409.22
Deduct excess included in above figures:		
Pacific Power & Light Co.—per page 5 of P. P. & L. write-up statement		\$ 6,312,038.15
Inland Power & Light Co. per page 2 of Inland P & L write-up statement now on Inland's books.....		185,026.10

(Testimony of Will T. Neill.)

PACIFIC POWER & LIGHT COMPANY
INLAND POWER & LIGHT COMPANY

Pacific Power & Light Company, Inland Power & Light Company—Summary of "Excess" Situation as It Will Exist on Books of Pacific Power & Light Company After Giving Effect to Consolidation With Inland Power & Light Company, as Per Adjustments Shown in Application—(Continued)

now on Pacific P & L books.....	\$ 139,819.17	
Total deductions		\$ 6,636,883.42
Balance—after deducting excess.....		\$36,275,525.80
2. Plant account of both Companies—after consolidation.....		\$42,727,383.12
Deduct excess included in above figures:		
Pacific P & L Co.—see above.....	\$ 5,334,427.66	
Pacific P & L Co.—from Inland—see above.....	139,819.17	
Excess eliminated in consolidation.....		\$ 5,474,246.83
Balance—plant account consolidated after deducting excess....		\$36,253,136.29
3. The excess in Pacific Power & Light Co. plant account, after consolidation of		\$ 5,474,246.83
will be represented by:		
Pacific Power & Light Co.		
1910 transaction	\$ 5,334,427.66	
1930—Taken over from Inland.....	139,819.17	
Net.....		\$ 5,474,246.83

(Testimony of Will T. Neill.)

Mr. Slaff: I would like also at this time, Mr. Examiner, to have marked for identification and received in evidence a photostatic copy of the minutes of a meeting of the Executive Committee of the American Power & Light Company, 71 Broadway, New York, New York, held on Monday, June 13, 1910. This particular photostatic copy of the minutes is an exhibit before the Securities and Exchange Commission, being No. 212-F, in Docket No. 59-12.

Trial Examiner: It will be marked for identification as [665] Exhibit No. 34.

(The Document Referred to Was Marked Exhibit No. 34 for Identification.)

Mr. Laing: No objection to it.

Trial Examiner: Exhibit 34 will be received.

(Exhibit No. 34 Was Received in Evidence.)

HEARING EXHIBIT No. 34

Securities and Exchange Commission. Docket No. 59-12. Commission's Exhibit No. 212 F. In the Matter of Elec Bond & Share. Date 8/31/41. Witness..... Elec Reporter, Inc. (Illegible.) Reporters. By Grover.

A meeting of the Executive Committee of the American Power & Light Company was held at

(Testimony of Will T. Neill.)

#71 Broadway, New York, N. Y., on Monday
June 13th, 1910, at 4:00 o'clock P. M.

PRESENT—R. E. Breed

F. L. Dame

S. Z. Mitchell

F. C. Walcott

N. M. Young

EPS

Mr. Wehrhane, a Director, was also in attendance.

Mr. S. Z. Mitchell, Chairman of the Board, acted as Chairman of the meeting, and Mr. E. P. Summerson, Assistant Secretary of the Company, acted as Secretary.

The Chairman presented a tentative plan of consolidation of the Astoria Electric Company, the Columbia Power & Light Company, the Walla Walla Valley Railway Company and the Yakima Pasco Power Company, the three latter companies being temporary organizations which had been formed to take over the properties of the Northwest Light & Water Company, the Yakima Valley Power Company and the properties of the Northwestern Corporation, east of the Cascade Mountains as had been acquired under and by authority of the Board of Directors at meetings held on February 15th, 1910 and March 11th, 1910 respectively. He proposed Pacific Power & Light Company as a suitable name for the new company, to be incorporated under the laws of the State of Maine and recommended that its capitalization be approximately as follows:

(Testimony of Will T. Neill.)

	Authorized	To be issued now
Common stock	\$6,000,000.00	\$6,000,000.00
Preferred Seven Percent Cumulative Stock	1,500,000.00	1,250,000.00

On motion, it was

Voted, that the consolidation of the aforesaid companies and the capitalization of same as above set forth be and the same hereby is approved.

The Chairman stated that the Portland Gas & Coke Company had tentatively arranged for the issuance and sale of \$215,000. par value of additional First Mortgage Five Percent Bonds, at 92½% & interest, of which \$50,000 par value would be issued forthwith and the remaining \$165,000. par value to be in the form of five percent interim certificates secured by deposit of \$165,000 cash with the United States Mortgage & Trust Company, New York, N. Y., as Trustee, redeemable from time to time, par for par, upon delivery to the Trustee of First Mortgage Five Percent Bonds authorized and issued under the terms of the mortgage securing same, and asked for a formal expression in the premises by the Committee.

On motion, it was

Voted, that the issuance of 50,000 par value First Mortgage Bonds and \$165,000. par value interim certificate and the sale thereof at 92½% and interest (EPS) as above is hereby approved.

The Chairman presented for the consideration of the Committee improvement requisitions numbers 13 for \$51,134.86 and 15 for \$26,286.80 covering respectively installation of Tungsten Lamps

(Testimony of Will T. Neill.)

for street lighting and extension of high pressure gas mains of the Kansas Gas & Electric Company, Wichita, Kansas.

On motion, it was

Voted, that the requisitions, as above, be and the same hereby are approved.

The Secretary asked for a resolution approving and authorizing the signatures of Messrs. Hill and Summerson as Vice President and Assistant Secretary respectively as endorsers as officers of this Company to four hundred and ninety three (493) shares of the capital stock of the Astoria Electric Company, and of four notes of \$50,000. each of the Yakima Pasco Power Company which have been deposited with the Standard Trust Company of New York, New York, N. Y., as collateral for the loan of this Company.

On motion, it was

Voted, that the endorsements on behalf of this Company as above be and the same hereby are approved.

There being no further business the meeting adjourned.

E. P. SUMMERSON

Secretary.

By Mr. Slaff:

Q. Mr. Neill, I hand you a document headed, "Pacific Power & Light Company, Statement of Cost to American Power & Light Company, Com-

(Testimony of Will T. Neill.)

mon Stock of Pacific Power & Light Company, as computed from statement prepared by D. W. Jack, Treasurer of American, furnished to the staff of the Federal Power Commission," and I will ask you if you will be good enough to identify that one-page tabulation.

A. Yes. That was prepared in our office.

Mr. Laing: That is a document you used as a memorandum in testifying on that subject, was it?

The Witness: That is correct.

Mr. Slaff: Yes. That is one of which you furnished copies either yesterday or the day before, Mr. Laing. I should like to have this document marked with the next exhibit number, and received in evidence.

Trial Examiner: It will be marked for identification as Exhibit No. 35.

(The Document Referred to Was Marked Exhibit No. 35 for Identification.) [666]

Trial Examiner: Exhibit 35 will be received.

(Exhibit No. 35 Received in Evidence.)

(Testimony of Will T. Neill.)

PACIFIC POWER & LIGHT COMPANY

STATEMENT OF COST TO AMERICAN POWER & LIGHT COMPANY OF COMMON STOCK OF
PACIFIC POWER & LIGHT COMPANY, AS COMPUTED FROM STATEMENTS PREPARED
BY W. D. JACK, TREASURER OF AMERICAN, FURNISHED TO STAFF OF FEDERAL
POWER COMMISSION.

Investment of American in securities and properties trans-
ferred to Pacific in 1910 (per statement furnished by D. W.

Jack, Treasurer of American—Revised Statement B—page 48)

Deduct proceeds from sale of preferred stock and bonds:

Preferred Stock (Revised Statement B—page 48.....

First Mortgage 5% bonds (Revised Statement B—page 48....

\$ 1,250,000.00

3,200,000.00

Total Par or P. A. of securities sold.....

\$ 4,450,000.00

\$ 4,749,135.09

(Testimony of Will T. Neill.)

Pacific Power & Light Company—Statement of Cost to American Power & Light Company of Common Stock of Pacific Power & Light Company, as Computed From Statements Prepared by D. W. Jack, Treasurer of American, Furnished to Staff of Federal Power Commission.—(Continued).

Discount and Expense on sale of stock (Revised Statement B—page 13—per Statement attached to letter of Neill of Sept. 10, 1940).....	161,500.00		
Discount and Expense on sale of bonds (Revised Statement B—page 48—see statement attached to letter of Neill of Sept. 10, 1940).....	448,616.25		
		\$ 610,116.25	
Total Discount and Expense.....			3,839,883.75
Difference or Net Proceeds.....			
Remainder applicable to Common Stock Received in 1910.....		\$	909,251.34
• Sale of 1,000 shares Common Stock for Cash May 19, 1915.....			100,000.00
Cost to American of addition Common Stock of \$1,245,000 issued by Pacific to American in 1930 transaction (per statement furnished by D. W. Jack, Treasurer of American—Revised Statement B—page 48).....			1,868,767.25
Investment of American in Pacific Common Stock as computed from the statements furnished by B. W. Jack, Treasurer of American referred to above.....			\$2,878,018.59

(Testimony of Will T. Neill.)

By Mr. Slaff:

Q. Now, underlying this summary exhibit, Mr. Neill, was certain data which you received from the American Power & Light Company, which you transmitted, also, to the Federal Power Commission examiners; is that correct?

A. That is correct.

Trial Examiner: Is that summary exhibit, Exhibit 35 which was just received; is that correct?

Mr. Slaff: Yes. The last one which has been offered.

By Mr. Slaff:

Q. I wonder if you would be good enough to identify the underlying material, together with the letters of transmittal, so that we might offer them for the record? A. Yes.

Q. I would like to have this material identified for the record.

A. This is material which had been previously furnished to the Commission's examiners. This is a document (indicating) which was obtained by us from D. W. Jack, Secretary-Treasurer of the American Power & Light Company, entitled "Statement of American Power & Light Company's Investment in the Companies and Properties Transferred to Pacific Power & Light Company at the Formation of the Latter [667] Company in 1910."

Attached to the statement is a copy of a letter dated September 10, 1940, with which I transmitted this copy of this statement to Mr. J. J. O'Neil, Chief Examiner of Accounts, Federal

(Testimony of Will T. Neill.)

Power Commission, 1006 Public Service Building, Portland, Oregon. The letter, also, shows a carbon copy of the statement and a letter with the statement went to Mr. J. J. Pentney, Senior Accountant, Public Utilities Commission of Oregon.

Mr. Slaff: I should like to have this marked for identification with the next exhibit number and received in evidence.

Trial Examiner: It will be marked as Exhibit No. 36 for identification.

(The Document Referred to Was Marked Exhibit No. 36 for Identification.)

Mr. Slaff: And I should like to have permission to withdraw this, so that it may remain in the Company's file; that is, I should like to withdraw it for the purpose of having copies made and then let the original remain in the Company's file, substituting a copy for the original in the record.

Trial Examiner: Very well.

Mr. Slaff: I offer that in evidence, Mr. Examiner.

Mr. Laing: No objection. [668]

Trial Examiner: Exhibit 36 will be received.

(Exhibit No. 36 Received in Evidence.)

By Mr. Slaff:

Q. Will you identify the next document, Mr. Neill?

A. The next document is a five-page typewritten statement, bearing the title "Statement of

(Testimony of Will T. Neill.)

American Power & Light Company's Investment in the Companies and Properties Transferred to Pacific Power & Light Company at the formation of the Latter Company in 1910," to which statement is attached the original of a letter received by me from Mr. D. W. Jack, Secretary-Treasurer of the American Power & Light Company, transmitting the described statement to me; and another letter dated December 27,—Mr. Jack's letter was dated December 23, 1940,—and another letter dated December 27, 1940, with which I transmitted a copy of Mr. Jack's letter and a copy of the statement to Mr. James H. Flynn, Chief Examiner of Accounts, Federal Power Commission, 1008 Public Service Building, Portland, Oregon. This letter also shows that a copy of Mr. Jack's letter and a copy of the statement was sent to J. J. Pentney, Senior Accountant for the Public Utilities Commission of Oregon.

Mr. Slaff: I should like to have this, Mr. Examiner, marked with the next exhibit number, and received in evidence; again, with permission to withdraw, if necessary, and have a copy made for the record. [669]

Trial Examiner: It may be marked for identification as Exhibit 37.

(The Document Referred to Was Marked Exhibit No. 37 for Identification.)

Trial Examiner: Is there any objection, Mr. Laing?

(Testimony of Will T. Neill.)

Mr. Laing: No objection to its being received.

Trial Examiner: The exhibit is received, and permission is granted to withdraw and substitute a copy.

(Exhibit No. 37 Is Received in Evidence.)

By Mr. Slaff:

Q. Will you identify the next document which you have, Mr. Neill?

A. The next document is a letter dated April 29, 1941, addressed by Mr. D. W. Jack, Secretary-Treasurer of the American Power & Light Company, transmitting a two-page statement, one of which is entitled "American Power & Light Company Purchase of Condon Electric Company", and the other is entitled "American Power & Light Company Purchase of Heppner Light & Water Company". Also there is attached to this document copy of a letter which was dated May 9, 1941, with which I transmitted a copy of Mr. Jack's letter and the two-page statement to Mr. James H. Flynn, Chief Examiner of Accounts, Federal Power Commission, care of Washington Water Power Company, Spokane.

Mr. Slaff: I should like to have that document marked [670] with the next exhibit number and received in evidence.

Trial Examiner: It will be marked for identification as Exhibit 38.

(The Document Referred to Was Marked Exhibit No. 38 for Identification.)

(Testimony of Will T. Neill.)

Mr. Slaff: With the same permission, to withdraw and substitute a copy.

Mr. Laing: No objection.

Trial Examiner: Exhibit 38 will be received, and permission will be granted to withdraw the original and substitute a copy.

(Exhibit No. 38 Received in Evidence.)

By Mr. Slaff:

Q. Now, will you be good enough to identify the next document which you have, Mr. Neill?

A. The next document is a two-page document—a three-page document—typewritten, the first page of which bears the title “Statement of American Power & Light Company Investment in Companies and Properties Transferred to Pacific Power & Light Company in 1911”, the second sheet bearing the same title, and the third sheet bearing the title “Statement of American Power & Light Company Investment in the Hydroelectric Company Transferred to Pacific Power & Light Company May 9, 1915.”

Q. May 19, 1915, is it not? [671]

A. Yes, May 19, 1915. Attached to these statements is the original of a letter addressed to me on April 29, 1941 by Mr. D. W. Jack, Secretary-Treasurer of the American Power & Light Company, and also a copy of a letter dated May 9, with which I transmitted copies of Mr. Jack's letter and the attached statements to Mr. James H. Flynn, Chief Examiner of Accounts, Federal

(Testimony of Will T. Neill.)

Power Commission, care of Washington Water Power Company, Spokane.

Mr. Slaff: I should like to have that marked as the next exhibit and received in evidence.

Trial Examiner: It will be marked for identification as Exhibit 39.

(The Document Referred to Was Marked Exhibit No. 39 for Identification.)

Mr. Laing: No objection to the receipt of that in evidence. Do you likewise wish to withdraw that and substitute a copy?

Mr. Slaff: Yes. Thank you.

Trial Examiner: Very well. Exhibit 39 will be received, and counsel is authorized to withdraw the exhibit for the purpose of making a copy.

(Exhibit No. 39 Received in Evidence.)

By Mr. Slaff:

Q. The next document is what, Mr. Neill?

A. The next document is a five-page typewritten [672] statement, entitled "Statement of American Power & Light Company Cost of Performance of Agreement with Pacific Power & Light Company, dated July 16, 1930." The statement is accompanied by a letter dated January 27, 1941, addressed to me by D. W. Jack, Secretary-Treasurer of the American Power & Light Company, and also by copy of a letter dated January 30, 1941, from me to Mr. James H. Flynn, Chief Examiner of Accounts, Federal Power Commission, 704 Public Service Building, Portland, Oregon; with which

(Testimony of Will T. Neill.)

letter I transmitted a copy of the statement and a copy of Mr. Jack's letter to Mr. Flynn.

Mr. Slaff: Mr. Examiner, I should like to have that document marked with the next number and received in evidence, with the same reservation for the purpose of substituting a copy for the original.

Trial Examiner: It will be marked for identification as Exhibit 40.

(The Document Referred to Was Marked Exhibit No. 40 for Identification.)

Trial Examiner: Is there any objection, Mr. Laing?

Mr. Laing: No objection.

Trial Examiner: Very well. Exhibit 40 will be received and permission granted to substitute a copy.

(Exhibit No. 40 Received in Evidence.)

Trial Examiner: We will take a five-minute recess.

(Whereupon, a short recess was taken after which [673] proceedings were resumed as follows:)

Trial Examiner: The hearing will be in order.
By Mr. Slaff:

Q. Mr. Neill, I show you a photostatic copy, headed "Investment in the Companies and Properties Transferred to Pacific Power & Light Company Under Agreement With Weld M. Stevens,

(Testimony of Will T. Neill.)

Dated July 23, 1910", which also is Exhibit No. 206 in the proceedings before the Securities and Exchange Commission, Docket 59-12, "In the Matter of Electric Bond and Share Company, et al", and ask you if this is a summary statement of what it purports to be in the heading. I realize that you have not prepared it and perhaps have not seen the exhibit before. I think it has been seen by people in your Company, however.

A. It seems to be a summary of the investments referred to in the title. [674]

Q. Mr. Neill, during this morning we have discussed the relationship of Inland to Pacific and discussed the principles arising out of that relationship, and we have all proceeded on the theory that we all knew the relationship between the two companies; however, I am not sure that that is set out in the record. Will you therefore tell us on the record Pacific's relationship to Inland, and what Inland does?

A. The Inland is a wholly-owned subsidiary of Pacific; Pacific owns all the stock of Inland, and also owns all of Inland's debts in the form of notes.

Q. That is, all the debts of Inland to Pacific are represented by notes; is that correct?

A. That is correct.

Q. As I understand it, the Inland has three hydroelectric projects?

A. I will outline a description of the properties. The Inland owns three hydroelectric projects, [693]

(Testimony of Will T. Neill.)

the largest of which is known as the Ariel Project on Lewis River in Washington; another small project is in Wallowa County, Oregon, known as the Wallowa Falls Plant, which is also, as is Ariel, a licensed project. The third plant is on the Crooked River, in central Oregon, known as the Cove Plant, which is also a licensed plant.

In addition to the three hydroelectric plants, the Inland also owns one transmission line which interconnects the Ariel Plant to the point at which the Inland Company line is connected with the transmission line now owned by Public Utility District No. 1 of Cowlitz County. The Inland operates the Ariel Plant and the Enterprise or the Wallowa Plant and the transmission line. The Cove Plant is leased from the Inland to the Pacific Company.

I think that is a general brief outline of the situation.

Q. I think that is sufficient.

Mr. Laing: You have not mentioned the holdings of the Inland above the Ariel Project.

The Witness: Oh, yes, I should have mentioned that.

In connection with the Ariel Plant, but not a part of the project property, that is, the licensed project property, the Inland Company also owns lands and has made a considerable investment in preliminary engineering and surveying expense in connection with other developmets [694] above the Ariel Plant on the Lewis River, what we ordi-

(Testimony of Will T. Neill.)

narily refer to as the upper Lewis River developments. [695]

Q. Now, there is another matter I want to take up with you, and that deals with the statement contained at page 7 of Revised Statement B on Exhibit 17, to the effect that your Company has come to the conclusion that no accurate basis exists for segregating the total of \$6,239,000 according to nature, which you have established in Account 100.5,—according to nature of its components, and that the present officers of the Company have no knowledge or means of knowledge, thirty years or more after the event, as to the weight which may have been given by the Directors of the Company in 1910 to the various elements of value inherent in the properties acquired in July of that year. Now, there are some [823] people here who were active in the original purchase of the properties of Pacific, are there not; for example, Mr. Talbot?

A. Yes, sir.

Q. That is Mr. Guy W. Talbot, who has been previously identified in this proceeding?

A. Yes, he was an officer, or president, shortly after the Pacific was organized, as the record discloses.

Trial Examiner: Do you know approximately the age of Mr. Talbot, Mr. Neill?

The Witness: No, I don't. Mr. Laing can tell you approximately, I think.

Mr. Laing: He was born on the 12th of August, 1873.

(Testimony of Will T. Neill.)

By Mr. Slaff:

Q. Mr. Talbot, as I understand it, is now retired from active participation in the affairs of the Company but is here in the courtroom and is still a Director of the Company?

A. Yes. He has been retired for several years—I mean from active duties—but he is still a Director of the Company.

Q. Does he still receive a salary from the Company? A. Yes, I believe he does.

Q. And Mr. L. A. McArthur is still about?

A. Mr. McArthur is still alive and is still in the Company's organization. [824]

Q. What is his position?

A. He is vice-president, and Mr. McArthur is no longer active in the general management or operation of the Company. He does lots of work for the Company, but he is not active in the details of the operation or management of the Company.

Q. But he is a Director, is he not?

A. He is.

Q. And was he with the Company from its inception, or thereabouts?

A. He was with the Company nearly as long as Mr. Talbot, I believe.

Q. Mr. Cookingham, is he still a Director of the Company? A. He is.

Q. He has been a Director of the Company since 1910, has he not?

(Testimony of Will T. Neill.)

A. Well, from a very early date, yes; it is in the record, too.

Q. He was, I believe, one of the first of the so-called Western Directors of the Company?

A. I believe so.

Q. Mr. Richards, is he still a Director of the Company? A. He is. [825]

Q. And has he been a Director of the Company since 1910?

A. I don't know the exact date, but it was a very early date; that is also in the record, I think, in some of the exhibits in the record.

Q. And Mr. John A. Laing is still active in the affairs of the Company; sometimes too active for us to get the rest that we ought to get?

A. Mr. Laing is quite active.

Q. Mr. Laing has been here with the Company since the fall of 1910; is that correct?

A. I believe so.

Mr. Laing: I will admit that, Mr. Slaff—it was in December of 1910 that I came here.

By Mr. Slaff:

Q. Mr. Schoolfield, is he still about?

A. Mr. Schoolfield is general superintendent of the Company now; formerly chief engineer, and he is either general superintendent or operating superintendent—general superintendent.

Q. How long has he been with the Company?

A. Mr. H. H. Schoolfield has been with the Company a good many years, too. Until about a year or so ago he was chief engineer. His early connec-

(Testimony of Will T. Neill.)

tion with the Company was in an engineering capacity. [826]

Q. Mr. C. W. Platt is still with the Company, is he not?

A. Mr. Platt is not an officer of Pacific Company now.

Q. He was an officer and is now special advisor to the Company as I understand it; is that right?

A. Yes; he was an officer of the Company until about—I don't know the date—1935 or '36; somewhere along there.

Q. And he came with the Company way back, if I recollect it, somewhere between 1910 and 1912?

A. No. I don't think Mr. Platt came in that soon. Mr. Platt came into the Pacific organization at a later date, as I remember it. Mr. Platt, originally, was chief accounting officer of Portland Gas & Coke Company, and eventually he became chief accounting officer of Pacific; but I don't know what date it was; but it was, as I remember it, some time later.

Mr. Laing: I can give you that date, if you like, Mr. Slaff.

Mr. Platt: 1924.

By Mr. Slaff:

Q. Mr. G. L. Myers is still about, is he not?

A. Mr. Myers is still in the Company's organization.

Q. How long has he been with the Company?

A. I believe Mr. Myers has been with the Company a long time; I believe he started out in a

(Testimony of Will T. Neill.)

secretarial job of [827] some kind—not corporate secretarial job, but he had been—he was with Mr. Talbot for a good many years, and I believe he is now assistant secretary.

Q. Mr. Hawkins, how long has he been with the Company?

A. Well, I believe Mr. Hawkins has been with the Company since its inception, or shortly afterwards.

Q. Mr. J. E. Yates, is he still alive?

A. Mr. Yates is still alive, yes. Mr. Yates is in the organization. Mr. Yates was in Mr. Schoolfield's department, in the general superintendent's department. Mr. Yates is an engineer. His activities have always been along engineering lines.

Q. And has he been with the Company since its inception? A. I couldn't say.

Q. Approximately when, then?

A. I don't know.

Q. How about Mr. Ainsworth?

A. Mr. Ainsworth was a Director of the Company until—well, I don't know how long; well, I don't know how long he has been a Director, but he was a Director of the Company along in '35 and '36.

Q. I think Mr. Ainsworth goes back as far as 1910 in a directorship of the Company. [828]

Mr. Slaff: Do you know that, Mr. Laing?

Mr. Laing: Just a moment, Mr. Slaff, and I can give you the exact date (Mr. Laing referring to

(Testimony of Will T. Neill.)

some papers). He was elected a Director August 20, 1910, and he resigned November 14, 1935.

By Mr. Slaff:

Q. Now, did you talk with any of these people, or any others, to determine or attempt to determine whether any segregation could be made of the amounts established in Account 100.5 according to nature, of the components?

A. No, I did not.

Q. And dealing for the moment with the properties acquired after the inception of Pacific, many of these people whose names you have mentioned participated actively, did they not, in the negotiation for the purchase of such after-acquired properties?

A. Do you mean the so-called 1911, '12 and '15 acquisitions?

Q. Yes. They made investigations prior to the purchase in conducting negotiations with vendors, —prospective vendors—and so on?

A. Undoubtedly some of them did. I mean just the—well, those men who were officers of the Company. I should say I am not familiar with what details of the work they did in that connection; but undoubtedly they must have. [829]

Q. And in the original acquisition of properties that came over to Pacific at its inception, Mr. Talbot was here, was he not, as an agent, acting on behalf of American in the acquisition of those properties?

(Testimony of Will T. Neill.)

A. I believe Mr. Talbot was here. I cannot say that as a fact of my own knowledge; but I believe that at the time of these acquisitions he may have been acting in some capacity for American.

Q. You said that, in connection with the determination, no accurate basis existed for segregating the total in Account 100.5 according to nature. Did you go through the Company's files, or have them checked, the correspondence files, and all other files dealing with the acquisitions of the various properties?

A. Do you mean, to determine whether or not there was correspondence relating to these early acquisitions at the time?

Q. Whether there was correspondence, or whether or not there were any engineering reports or other types of reports, which might give you an indication of what was being bought, and why?

A. We attempted, of course, to get all of the information out of the existing records which we could. I personally have been through some of the old files, many of which do not exist now. We dug up all of the old engineering reports which we could and, as you know, all of the [830] audit reports and all the books of the old companies, and I believe we got all the information that was available in our records with respect to those acquisitions.

Q. Now, in connection with the acquisition of a property, a going electric property, the price paid may be a payment for tangible property only, or

(Testimony of Will T. Neill.)

for tangible and intangible property; isn't that correct? A. I believe so, yes.

Q. Now, with respect to the portion of the purchase price which can be attributed to physical property, is it fair to say, in your judgment, that the maximum amount attributable to physical property is the replacement cost of the property less depreciation?

A. Well, that is certainly an item that is important at the time of acquisition.

Q. Well, I am speaking, Mr. Neill, not of the over-all price; but I am trying to break down, if we can, an over-all price into its components into that which can be said to be attributable to the physical property, and that which can be said to be attributable to the intangible property acquired, and with respect to the physical property, that part of the purchase price which may be attributable to that, and that alone. Is it, in your judgment, fair to say that the maximum of a total purchase price which can be attributed, or attributable, to physical property, is the replacement cost of the [831] property, less depreciation?

A. Well, I think that is a good index of the physical element, yes.

Q. And, of course, in the replacement cost you would include—or I certainly would include, and I think you did—the fair market value of land?

A. Well, that goes without saying, in figuring replacement.

Q. Sure. Now, then, is it fair to say that any-

(Testimony of Will T. Neill.)

thing above that amount in a purchase price is a payment for intangible property?

A. Well, it is certainly a payment for what you might call intangible values. Of course, there are some questions of water rights and things like that come in—water right values. Those are intangible values, as I see it, speaking generally, in any situation as to the present and prospective values which may be in the particular situation.

Q. And among the intangible values that would be found in a purchase of an electric property would be such things as going value; is that right?

A. Yes.

Q. Good will? Does it include that, also?

A. Well, that is a term that is not very much used now. It is probably a part of the going value, as I understand it. [832]

Q. Franchise value?

A. Well, the whole thing is sort of a general value connected with the situation, depending upon what you are doing, tying it in to other properties, and so on. I think so far as my understanding of it is concerned, the statement we have in Revised Statement B,—

Trial Examiner: Exhibit 17, Mr. Slaff?

The Witness: Exhibit 17.

By Mr. Slaff:

Q. That would be at the bottom of the page?

A. Yes. Those are the things which, in my opinion, are involved in the intangible value at the time of acquisition.

(Testimony of Will T. Neill.)

Q. And all those types of intangible values, while it might be possible to segregate or pigeon-hole them, they all tend to merge?

A. I think so. I thought at one time that I would try to divide them up, and do a little speculating; but I found it would be highly speculative and an impractical thing to do.

Q. And they all tie in, do they not, with an evaluation the prospective purchaser makes of the prospective earning power of the situation?

A. I think they are all found in the situation. In any acquisition there are potential values coming about by [833] tying a property in with others to get greater efficiency in the use of the whole system and a better chance for development or rapid growth. We are speaking of intangibles, of course, and those elements are all taken into consideration.

Q. And those payments over and above the payments for the physical property, which represent generally the evaluation in the purchaser's mind of all those intangible elements which tend to merge and give the purchaser his appraisal of the prospective earnings of the properties, tie in, as it were, with the other properties operated, as the purchaser may conceive they should be operated in the future?

A. That is a part of it. Of course, some of the values have already been created in the development of the properties up to the time of acquisition.

(Testimony of Will T. Neill.)

tion. Going value is one of those. All of the pioneering effort and grief of the original developers of the property up to this point is given consideration; those are items which enter into the picture.

Q. Sure.

A. Without any particular evaluation as the amount of going value being,—

Q. Surely. Without any particular evaluation as to such elements as going value, which have already been created, those are elements of existing earning capacity rather than potential earning capacity? [834]

A. I don't know as to earning capacity; that comes into the whole picture, both present and future.

Q. You couldn't very well have any going value if you didn't have earnings, satisfactory earnings; isn't that so?

A. Of course that depends on conditions at the time as to why the earnings are low, as I see it.

Q. But, essentially, what you consider as going value and what you have spoken of as going value is the ability of the property to return a profit, in view of the fact that it is an established business, with its procedure established and with its trained personnel; those are elements which go into the business and the ability to earn a profit?

A. As I see it, the going value is made up of a lot of things that have been done in the development of the property to that time; it is now a mature thing which has come into being. The "bugs"

(Testimony of Will T. Neill.)

have been gotten out, and the operating procedure has been established; the personnel has been trained, and there has been a lot of work done, money spent in building the business, and so on; all of those things come into the picture when you speak of going value.

Q. As regards the difference between the original cost of the properties acquired by American and the cost to American, that difference was essentially, was it not, the payment by American for intangibles? [835]

A. Well, I think intangibles must have entered into it, yes.

Q. Now, concerning ourselves solely with the difference in the original cost of those properties and the cost to American, it is a fact, is it not, that that difference was essentially payment for intangibles?

A. Well, that is getting back to a long time ago. I don't have any idea, of course, what was in the minds of the acquirers of the property, and I don't, of course, know what the physical values of the properties were at the time of acquisition.

Q. There was an appraisal made, was there not, by J. G. White of the properties acquired by Pacific, at its inception?

A. There was an appraisal by J. G. White some time in 1910, I believe.

Q. And the appraisal was made as of the date of the organization of the Pacific, was it not?

(Testimony of Will T. Neill.)

A. I don't know as to the exact date, Mr. Slaff; it was in 1910; I do know that.

Q. Are you familiar with what that appraisal shows as to the reproduction costs or replacement costs of those properties acquired by Pacific, less depreciation?

A. No, I am not. I have seen the report; I have never read it completely. We have never done very much with [836] the White appraisal, because it did not appear to be in sufficient detail for our use; I mean, as we had to have the information later in connection with our property retirements and things of that kind.

Trial Examiner: Is this a good place for a recess?

Mr. Slaff: Yes.

Trial Examiner: We will recess for five minutes.

(Whereupon, a short recess was taken after which proceedings were resumed as follows:)

Trial Examiner: The hearing will be in order.
By Mr. Slaff:

Q. There was also an appraisal of the properties of Pacific made in 1912 by Mr. Hagenah, was there not? A. Yes.

Q. You prepared, did you not, and turned over to our staff a few days ago a tabulation headed "Pacific Power & Light Company Acquisition Adjustment Studies 1910 Acquisition"?

(Testimony of Will T. Neill.)

A. Yes, we did.

Q. Do you have it before you? A. Yes.

Q. It appears from that, does it not, that the estimated reproduction cost, less depreciation, at the time of the acquisition of the electric properties acquired from Columbia Power & Light Company was \$743,725: is that right?

A. Yes. For the purpose of this calculation we [S37] developed that figure in order to break down the acquisition adjustment on the basis of reproduction cost.

Q. Of the physical property?

A. Of the physical property—the estimated reproduction new of the physical property, less estimated depreciation. The reproduction costs new were taken as reproduction costs new as per the 1912 Hagenah appraisal, less the net additions from the time of acquisition to the time of appraisal, 1912. In order to get the figures we used the only information we had at that time as to estimated cost of reproduction close to the time of acquisition: and, of course, any estimate made at that time. I mean, for all the properties, on that basis, would be satisfactory for the development of the ratio.

Q. Well, what you did use were the two appraisals that actually had been made, the Hagenah 1912 for the purpose of determining reproduction cost new and the J. G. White appraisal for the purpose of determining the amount of depreciation of the properties at the time of acquisition?

(Testimony of Will T. Neill.)

A. Because we could not use the Hagenah appraisal, by itself, because it was at a later date, and we had to get added data.

Q. It was the Hagenah appraisal, less the net addition?

A. Of course there was an assumption that there might [838] be some error in that, but the whole purpose was to get a ratio for splitting down the acquisition adjustments which we calculated. Whether the basis from which you got your ratio was too high or too low would not change the ratio after you got it.

Q. These two appraisals were, so far as you can judge, the best information available in your records in respect to the reproduction costs or replacement costs, less depreciation—

A. (interposing) Those two appraisals are the only two appraisals that were available as to what may have been the reproduction cost new and depreciation as of those dates.

Q. The Columbia Power & Light property shows an estimated reproduction cost new, less depreciation, at date of acquisition, \$773,725, and the original cost of those properties is shown as \$723,889; is that correct?

A. That is right; over in Column 10.

Q. And the electric property of the Wasco Warehouse Milling Company, that is shown at, reproduction cost new less depreciation at date of acquisition, \$203,796, and the original cost, from your statement, \$230,740; is that correct?

(Testimony of Will T. Neill.)

A. And 45 cents; that is correct.

Q. Now, the Yakima-Pasco Power Company electric property is shown at reproduction cost new less depreciation, at date of acquisition, \$1,209,334; is that not correct? [839]

A. That is correct.

Q. And the original cost, from Statement B, \$1,248,565, is that correct?

A. That is correct.

Q. And, finally, the electric property that came from the Astoria Electric Company is shown, reproduction cost new less depreciation at date of acquisition, at \$222,462; and the original cost is shown at \$245,306; is that correct?

A. That is correct.

Q. And, roughly, I total those figures to make a total of \$2,409,000 for reproduction cost new, less depreciation, of the properties? Also, \$2,448,000 as original cost of the property?

A. I have not added them. It is somewhere close to those figures.

Q. And the amount paid by American over the original cost of those properties for the electric properties was \$1,581,000; is that right? On this basis that you use in this tabulation that we have been discussing?

A. Yes; that is shown in Column 11 of the tabulation.

Q. On Revised Statement B, page 47, Column 7, the excess over original cost, on the basis which

(Testimony of Will T. Neill.)

you use in your Revised Statement B, paid by American was \$1,332,086; is that right?

A. Against the electric properties. [840]

Q. Yes. That is correct, is it not?

A. Yes, that is correct.

Q. Now, in view of the fact that the reproduction costs of those properties, less depreciation, appear to be somewhat less than the original cost of those properties, wouldn't it be fair to say that the amount paid by American in excess of the original cost for those properties represented payment for intangibles?

A. I should think so.

Q. And those amounts have remained in the balance sheets of your Company for something like 30 years now; that is correct, is it not?

A. Well, of course, I think some of those, through the methods in which we have retired our physical properties, as they have been disposed of and changed from time to time, perhaps have been retired on a basis higher than the original cost, has the effect of retiring some part of that original acquisition cost.

Q. That amounts, in total, to about \$100,000; perhaps a trifle less; is that correct; of your acquisition adjustment amount?

A. Of course, we have made no calculation, because it would be a very long calculation, to find out how much has been retired in excess of estimated original costs. You see, our retirements were made for many years on the basis of [841] esti-

(Testimony of Will T. Neill.)

mated values, based on some of these early appraisals, and it is our opinion, without having made the detailed calculation, that there has been some excess retired.

Q. Well, there is still, is there not, in your Plant Account, over \$1,200,000 of that original excess?

A. Well, according to page 47. of Revised Statement B, to reconcile adjustments to tie this original cost at the time of acquisition with various acquired properties, plus our recorded gross additions and recorded net additions, it indicates that the amount in this sheet, Column 5, amounts to \$138,485.84. I just don't know exactly what made that up, but that is the reconciling adjustment to tie into the more accurately determined costs as of December 31, 1936. That is the only indication we have of what happened on account of the various things we have done accountingwise in retiring properties since these properties were acquired. I will also state that by far the major part of the one million three is still in property—in the Plant Account.

Q. There are one or two other matters I want to call your attention to, Mr. Neill, and then we are through. In connection with Cause No. 6736 before the Washington Department of Public Service, I should like to ask you whether you testified as follows: When was that case before the Department?

A. In 1935, I guess. [842]

(Testimony of Will T. Neill.)

Q. I will ask you whether you testified as follows, at pages 1188 and 1189 of the transcript (reading):

“However, a comprehensive examination of these records and those of predecessor companies by expert accountants retained by the Public Service Commission of Washington in the 1915 valuation and rate investigation, the results of which examination are a part of the formal record in that proceeding, disclosed the fact that for the electric property then owned by Pacific Power & Light Company in Washington and in Umatilla County, Oregon as of June 30, 1913, an actual expenditure of \$5,563,459.10, in cash or its equivalent, had been made for property purchased and subsequent additions and improvements.

“In determining this cost, no weight was given to the set up of the company’s securities at the time. The determined cost consisted of actual cash or its equivalent paid by American Power & Light Company, and actual cash paid by Pacific Power & Light Company to June 30, 1913 for acquisition of other properties and for construction of additions and improvements to its holding.”

Did you so testify?

A. I so did, if this is a substantially correct copy of the transcript. I don’t doubt it.

Q. I presume you can check that with the copy your Company has at the office, and, if it is incorrect, you will [843] so advise us, of course.

(Testimony of Will T. Neill.)

Another thing, in connection with that same case, did you also testify at page 1190 of that transcript:

“This figure does not include any allowances for working capital, going value or development cost or other intangible items. The actual cash cost of \$5,563,459.00 to the Pacific Company (and its affiliate American Power & Light Company) is therefore approximately \$1,345,000.00 in excess of starting figures employed by the Department and the company in the present case in making their estimate of the ‘Cost of Construction.’ This difference represents honest cash investment made in creating the electric system of the company as it stood on June 30, 1913, and should be taken into account in making any determination of value based on historical cost or prudent investment.”

Did you so testify?

A. I so testified.

Mr. Slaff: Now, one other thing, Mr. Laing, which I might address to you: Is there any question about the status of the Pacific Power & Light Company as a utility, as defined by the Federal Power Act?

Mr. Laing: Do you mean as to its being the owner of the facilities that are used for the interstate transmission of electricity?

Mr. Slaff: Yes. [844]

Mr. Laing: No.

Mr. Slaff: I take it, it is unnecessary, then, to

(Testimony of Will T. Neill.)

go into any testimony, either by Mr. Neill or any of our own witnesses, with respect to the physical characteristics of the property?

Mr. Laing: I think the maps that are in evidence show that we have interstate transmission lines at several points between the States of Washington and Oregon. [845]

JAMES H. FLYNN

called as a witness on behalf of the Commission having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Goldberg:

Q. Will you state your name for the record?

A. Mr. James H. Flynn.

Q. What is your profession?

A. I am an accountant.

Q. By whom are you employed?

A. By the Federal Power Commission in its Division of Original Cost.

Q. In what capacity are you so employed?

A. As a Chief Examiner of Accounts. [848]

Q. Did you participate in a field examination of the reclassification and original cost study submitted to the Commission by Pacific Power & Light Company?

A. I did. I was placed in charge of this examination on October 1, 1940.

(Testimony of James H. Flynn.)

Q. Did you initiate the field examination?

A. No. The field examination had been in progress for some time previously under the supervision of Mr. John J. O'Neil. I succeeded Mr. O'Neil, who was transferred to other duties.

Q. When was the field examination completed?

A. February 15, 1941.

Q. Where was this field examination made?

[851]

A. At the offices of Pacific Power & Light Company in the Public Service Building, Portland, Oregon.

Q. Did any other regulatory body participate in this examination.

A. Yes, the examination was made jointly by the staffs of the Federal Power Commission and the Public Utilities Commissioner of the State of Oregon. A study similar to the report filed with the Federal Power Commission had been filed by the company with the Public Utilities Commissioner of Oregon in accordance with that Commissioner's Order of September 26, 1938. The examination of these identical studies was made jointly and on a cooperative basis by the staffs of the respective Commissions.

Q. Now as a result of this field examination of the company's study of original cost, did you prepare a report to the Federal Power Commission?

A. As a result of the field examination, the staffs of the Federal Power Commission and the Public Utilities Commissioner of Oregon collabor-

(Testimony of James H. Flynn.)

ated in the preparation of a joint report. This report was based upon an examination of books, records, contracts and other documents made available for inspection by Pacific Power & Light Company, and a review of the files of the Public Utilities Commissioner of Oregon and the Department of Public Service of the State of Washington.

[852]

Q. I hand you a document entitled "Report on the Reclassification and Original Cost studies of Electric Plant as at January 1, 1937, Pacific Power & Light Company, Portland, Oregon", which report has been marked for identification as Exhibit No. 16, and I ask you whether it is the report you have just described.

A. Yes, this is the joint report resulting from the field examination, and contains the adjustments and recommendations of the respective Commissions' staffs. [853]

JOHN J. O'NEIL

called as a witness on behalf of the Commission, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Goldberg:

Q. Will you state your full name for the record, please? A. John J. O'Neil.

Q. What is your profession, Mr. O'Neil?

(Testimony of John J. O'Neil.)

A. I am an accountant.

Q. Are you employed by the Federal Power Commission in its Division of Original Cost?

A. I am.

Q. What position do you hold with the Federal Power Commission?

A. Chief Examiner of Accounts.

Q. How long have you been employed by the Federal Power Commission?

A. Since October 19, 1938, and from that date until September 1, 1939 my title was that of Principal Examiner of Accounts, and thereafter my title was that of Chief Examiner of Accounts.

Q. As a Chief Examiner of Accounts for the Federal Power Commission in its Division of Original Cost, what are [874] your duties?

A. Briefly, my duties consist of making and supervising field examinations of studies submitted by electric utilities relative to the reclassification of electric plant accounts pursuant to Electric Plant Instruction 2-D of the Uniform System of Accounts promulgated by the Federal Power Commission, and the orders of the same Commission adopted on May 11, 1937.

Q. Will you please state your professional training and practical experience in the accounting field?

A. I was graudated from grammar school in 1919, from St. James Academy in 1922, and from Pace Institute of Law and Accountancy in 1925. Thereafter, until August of 1926, I was employed in minor accounting and secretarial capacities.

(Testimony of John J. O'Neil.)

From August, 1926 until October, 1927, I was employed as an accountant on the staff of Clifford Yewdall, Certified Public Accountant, during which time I made or supervised a number of annual audits including the reports thereon. In October, 1927, I opened an office for the practice of public accounting, and between that date and January, 1928 I performed several audits and installed a number of bookkeeping systems for contractors. From January, 1928 until September, 1936, I was employed by New York Water Service Corporation, in the capacity of Chief Accountant. As such, I had complete supervision of all the [875] accounting records of nine separate utility companies, consisting of thirty-two operating plants. During this time, I made or supervised a number of original cost studies for the properties over which I had accounting jurisdiction. In September, 1936, as a result of competitive examination, I received the appointment of Senior Public Service Accountant from the Public Service Commission of the State of New York. As a result of further competitive examination, my title was subsequently changed to Associate Public Service Accountant. From September, 1936 until October, 1938, the period of my association with the Public Service Commission of the State of New York, I assisted in two major original cost examinations then being made by the Commission. Since October, 1938, I have been in the employ of the Federal Power Commission in the Division of Original Cost, and

(Testimony of John J. O'Neil.)

during that time, I have made or supervised twelve or more original cost field examinations.

Q. As Chief Examiner of Accounts for the Division of Original Cost of the Federal Power Commission, what was your association with the field examination of the reclassification and original cost studies of Pacific Power & Light Company?

A. I was first assigned to the field examination of Pacific Power & Light Company in July of 1940. Prior to that time, during the year 1939, an extensive examination of the company's estimated cost of construction schedules [876] had been made by the staffs of the Federal Power Commission and the Public Utilities Commissioner of the State of Oregon. During the latter part of 1939, the company, which up to that time had not as yet filed its report with the Federal Power Commission, decided to change its approach to the problem of reclassification. Therefore, in February of 1940, the staffs of the respective commissions suspended their field examination pending the submission of a report by the company. This report was finally submitted to the commissions on July 3, 1940, and on July 9, 1940, the staffs of the respective commissions resumed their field examination. I was in charge of the staff of the Federal Power Commission making the field examination until October 1, 1940. On that date, I was relieved by Mr. James H. Flynn, also a Chief Examiner of Accounts of the Division of Original Cost. Thereafter, I entered on duties of a general supervisory nature,

(Testimony of John J. O'Neil.)

during which time I kept closely in touch with the progress of the examination of Pacific Power & Light Company.

Q. Now with respect to the joint report of the staffs of the Federal Power Commission and the Public Utilities Commission of Oregon, which is Exhibit 16 in this case, did you participate in the preparation of that report?

A. The staffs of the respective commissions collaborated in the preparation of that joint report. I assisted materially in its preparation, concurred in its conclusions, [877] and signed that report.

Q. Have you heard the testimony of Mr. J. H. Flynn in this case with respect to the joint staff report?

A. I have.

Q. And do you concur with the testimony as given by him?

A. I do.

Q. Now with respect to the conclusions reached by the examiners as set forth in that joint report, it was recommended, was it not, that the company institute certain studies with respect to amounts established in Account 100.6, Electric Plant in Process of Reclassification, and in Account 107, Electric Plant Adjustments, so as to permit of proper reclassification, allocation and disposition of the amounts appearing therein?

A. That is right.

Q. In conformity with those recommendations, the company has submitted in this case, a further study, which is Exhibit 17, has it not?

A. That is correct.

Q. Have you made an examination of the company's revised study?

A. I have.

(Testimony of John J. O'Neil.)

Q. And when was this examination made?

A. The study was submitted to me at the company's [878] offices here in Portland during the week of September 22nd, immediately prior to this hearing. Since its receipt, it has been examined by members of the staffs of the Federal Power Commission and the Public Utilities Commissioner of Oregon.

Q. And as a result of such examination as has been made of the revised reclassification and original cost study of Pacific Power & Light Company, which has been submitted as Exhibit 17 in this proceeding, have you come to any conclusion with respect to its acceptability for purposes of original cost?

A. The studies which have been made by the company have assisted materially in clarifying numerous items, the reclassification of which was either impossible or obscure in the first study submitted. The results obtained from these studies substantiate the initial recommendation of the examiners that such studies be made. Basically, the company's revised studies contain a great deal of information which was not available to the examiners in previous field examinations. However, it is the opinion of the examiners that the information and data obtained by the company from these studies have not in all cases been properly applied or reclassified, with the result that it has been necessary to make further adjustments of the company's revised studies.

(Testimony of John J. O'Neil.)

Q. Have you prepared a statement of the adjustments [879] which it is believed are necessary to properly apply and reclassify the information and data obtained in the company's studies?

A. I have. I have prepared an exhibit which I have termed a "Reconciliation of Amended Reclassification Summary Statement of Commission Staffs with the Reclassification Summary Statement as Submitted by the Company."

Q. I show you a tabulation which is entitled "Reconciliation of Amended Reclassification Summary Statement of Commission Staffs with the Reclassification Summary Statement as Submitted by the Company", as of January 1, 1937, and ask you if that is the tabulation that you have just described as having been prepared by you?

A. It is.

Mr. Goldberg: I would like to have the tabulation marked with the next exhibit number, for identification.

Trial Examiner: It will be marked for identification as Exhibit No. 43.

(The document referred to was marked Exhibit No. 43 for identification.)

By Mr. Goldberg:

Q. Now, generally, what does Exhibit 43 purport to show, Mr. O'Neil?

A. Generally, the statement shows the reclassification by accounts as reflected in the summary statement [880] appearing in the company's revised original-cost study, page 47, the proposed adjust-

(Testimony of John J. O'Neil.)

ments of the commission staffs, and the adjusted reclassification. The purpose of this statement is to effect a reconciliation between the results shown in the company study and the results arrived at by the Commission staffs in such a manner as to clearly set forth the proposed adjustments, their nature, and the accounts to which they apply.

Q. Now, with specific reference to Exhibit 43, does the first line which you have indicated as "As Per Company Reclassification Summary Statement, Exhibit 17" show the amounts as they have been submitted in the company's revised original cost study? A. That is correct.

Q. And the amounts set forth on that line are in agreement with the summary of adjustments which the company claims are necessary to state as of January 1, 1937 the accounts prescribed in the Federal Power Commission Uniform System of Accounts as set forth in Statement E of the company's revised Exhibit 17; is that correct?

A. That is correct. The statement starts off with the same figures as appear in the company's revised Statement E.

Mr. Laing: May I interrupt a moment?

Mr. Goldberg: Surely.

Mr. Laing: In other words, the top line of Exhibit 43 [881] corresponds with the closing line on page 47, Exhibit 17, where all the figures are assembled in a grand total?

The Witness: That is correct.

(Testimony of John J. O'Neil.)

By Mr. Goldberg:

Q. Well, before taking up the question of the various adjustments, can the amounts adjusted be determined from the books of Pacific Power & Light Company?

A. No, they cannot. The adjustments relate primarily to costs incurred by American Power & Light Company or excess amounts paid to American Power & Light Company by Pacific.

Q. What is the reason for using costs appearing on the books of American Power & Light Company?

A. In order to properly explain that, it would be well to explain first the organization of Pacific Power & Light Company. That company was organized under the laws of the State of Maine on June 16, 1910 to take over certain properties which had previously been acquired by American Power & Light Company, the present parent company of Pacific Power & Light Company. American Power & Light Company has owned 100 percent of the common stock of Pacific Power & Light Company ever since the incorporation of the latter company in 1910. Prior to the formation of Pacific Power & Light Company, American Power & Light Company had acquired certain operating properties. The common stock of [882] Astoria Electric Company had been acquired from Electric Bond & Share Company, which organized and controlled American Power & Light Company. In April, 1910 American Power & Light Company had

(Testimony of John J. O'Neil.)

formed Columbia Power & Light Company to take over certain operating properties which it had acquired from the Northwestern Corporation. In March, 1910, American Power & Light Company had organized Yakima-Pasco Power Company to take over the electric, gas and water properties in the Yakima Valley which American had acquired from the Northwest Light & Water Company and the Yakima Valley Power Company. American Power & Light Company therefore owned and controlled Astoria Electric Company, Columbia Power & Light Company and Yakima-Pasco Power Company. In June 1910, American Power & Light Company caused Pacific Power & Light Company to be organized to take over the properties of these three wholly-owned companies. The transfer was effected as of July 1, 1910, and in exchange for these properties Pacific Power & Light Company issued to American Power & Light Company \$1,250,000 of preferred stock, \$3,200,000 of first and refunding mortgage bonds and \$5,997,000 of common stock. In addition to the properties of these three companies, Pacific Power & Light Company received \$499,500 par value of stock of Walla Walla Valley Railway Company. The securities issued by Pacific Power & Light Company represented the entire amount of securities then outstanding. It follows from the nature of [883] this transaction that there was no change in the ownership of the properties. American Power & Light Company owned and controlled the properties before trans-

(Testimony of John J. O'Neil.)

fer. Through the medium of complete common stock ownership, American Power & Light Company owned and controlled Pacific Power & Light Company after the transfer. The securities issued by Pacific Power & Light Company were in payment or reimbursement of the costs incurred by American Power & Light Company in the acquisition of the properties, in so far as such costs were incurred. In brief, the investment of American Power & Light Company with its attendant costs was transferred to the books of Pacific Power & Light Company. By the formation of a new corporation the miscellaneous investment costs of American Power & Light Company were consolidated into a single investment in Pacific Power & Light Company, and the various components of those investment costs were transferred to the books of Pacific Power & Light Company. It follows then that in order to properly segregate and reclassify the costs of the properties acquired by Pacific Power & Light Company upon inception that we must look to the records of American Power & Light Company in which these costs were first accumulated. This has been done. The costs to American Power & Light Company as a separate identity are no different than the costs to American Power & Light Company, owner of Pacific Power & Light Company. Pacific Power & Light Company is [884] but an account in the general ledger of American Power & Light Company, the costs of which have been analyzed and established on the

(Testimony of John J. O'Neil.)

books of that company. Securities have been substituted for the costs, but there has been no change in the costs. As a result, certain of the subsequent adjustments result from an analysis of system costs of the properties acquired.

Mr. Goldberg: May I suggest this is an appropriate time for recess?

Trial Examiner: All right. We will stand in recess for five minutes.

(Whereupon, a short recess was taken, after which proceedings were resumed as follows:)

Trial Examiner: The hearing will be in order.

By Mr. Goldberg:

Q. Have you examined the costs to American Power & Light Company of the properties transferred to Pacific Power & Light Company upon organization in 1910, which is Exhibit No. 37 in this case? A. I have.

Q. And have you prepared a summary of these costs in exhibit form? A. I have.

Q. I show you a tabulation entitled "Pacific Power & Light Company Analysis of Costs Incurred by American Power & Light Company in the 1910 transaction", and ask you if that [885] is the summary you had reference to? A. It is.

Mr. Goldberg: I would like to have this tabulation, Mr. Examiner, marked for identification with the next exhibit number.

Trial Examiner: It will be marked for identification as Exhibit 44.

(Testimony of John J. O'Neil.)

(The document referred to was marked Exhibit No. 44 for identification.)

By Mr. Goldberg:

Q. Directing your attention, Mr. O'Neil, to Exhibit No. 43, with respect to the adjustment of \$4,559.68, shown on the exhibit as representing organization expense, will you explain how that amount was arrived at?

A. Reference to the Exhibit No. 37 showing the costs to American Power & Light Company will indicate certain expenditures which have been construed by the examiners to represent proper organization expenses of Pacific Power & Light Company. They comprise four separate items as follows: Incorporation fees in the state of Maine, \$840.76; Legal Expenses in connection with incorporation, \$250.00; Miscellaneous Organization Expenses \$2,143.27; and Investigation and Organization Expenses \$2,416.36. Each of these items will be found listed individually on the statement of costs prepared by American Power & Light Company, Exhibit 37, on pages 6 and 7 thereof. [886] After further investigation, the examiners are of the opinion that these amounts should be allowed as cost of organization. These items aggregate \$5,650.39. Since an amount of \$1,090.71 had previously been set up in the staff report, and has been included by the company in Account 100.1, Electric Plant in Service, in its revised Exhibit F, it follows that an additional adjustment of \$4,559.68 is necessary.

(Testimony of John J. O'Neil.)

Q. And does that amount of \$4,559.68 appear anywhere on Exhibit 44?

A. That amount appears in Exhibit 44 under the column headed "Organization Expense of Pacific Power & Light Company."

Q. That is included in the amount of \$5,650.39, shown in that column? A. That is correct.

Q. In that connection, I note from Exhibit 43 that your adjustment contemplates the transfer of \$4,559.68 to Account 100.1, Electric Plant in Service, from Account 100.5, Electric Plant Acquisition Adjustments. Will you please explain why the transfer has been made from Account 100.5?

A. The necessity for this transfer from Account 100.5, Electric Plant Acquisition Adjustments, becomes apparent upon consideration of the procedures adopted by the company in the preparation of its revised exhibit 17. I refer specifically to page 47, Revised Statement B, of that exhibit. With the exception of the \$42,554.68 adjustment [887] of the Powerdale generating station, and certain predispositions of amounts to accounts 111, Investments in Associated Company, Account 140, Unamortized Debt Discount and Expense, Account 151, Capital Stock Expense, and Account 250, Retirement Reserve, the company has adopted a policy of establishing all other amounts in Account 100.5, irrespective of the applicability of certain provisions of the Uniform System of Accounts which require reclassification in other accounts. Therefore, a number of the adjustments found necessary by the ex-

(Testimony of John J. O'Neil.)

aminers to properly reclassify established amounts must be made through the medium of Account 100.5 wherein they have been classified by the company in its revised statements. This policy will become increasingly apparent in the explanation of subsequent adjustments.

Q. And this amount of \$4,559.68, which is now being transferred to Account 301 within Account 100.1, Electric Plant in Service, plus the amount of \$1,090.71, which was allowed in the staff report, Exhibit 16, and also included by the company in its revised Exhibit 17, will establish an amount of \$5,650.39 in Account 301, Organization Expense, is that correct?

Mr. Laing: May I interrupt?

Mr. Goldberg: Surely.

Mr. Laing: There is not a revised Exhibit 17. We have our revised statement in Exhibit 17. I don't want the [888] record to indicate there was a revised exhibit.

The Witness: I might have misread it. I was referring specifically to page 47 of Revised Statement B. I am sorry. I did mention a revised Exhibit 17.

Mr. Laing: Excuse me for interrupting.

By Mr. Goldberg:

Q. Will you go ahead and answer the last question?

A. That is correct, and that amount will be in agreement with the four items which I have enumerated and which appear individually on the state-

(Testimony of John J. O'Neil.)

ment of costs to American Power & Light Company. That is Exhibit 37.

Q. Referring to the next adjustment shown on Exhibit No. 43 which is in the amount of \$5,773.65 and which is labeled items of Debt Expense, will you explain that adjustment?

A. Reference to the analysis of costs to American Power & Light Company on page 6 of Exhibit No. 37 will indicate that certain items appearing therein represent expenses in connection with bonds issued by Pacific Power & Light Company to American Power & Light Company in 1910. These items are as follows:

Printing, \$1,933.65; Columbia Trust Company. \$500; Discount on American Power & Light Company 6 percent notes, \$1,800; and Legal Expense in connection with security issues, \$1,500. These items are shown individually on the statement of costs to American Power & Light Company. [889]

Q. I note that you have transferred this item to Account 140, Unamortized Debt Discount & Expense, in your columnar headings. In view of the provisions of Account 107, Electric Plant Adjustments, appearing in the Uniform System of Accounts, would it not be more proper to have made this transfer to Account 107?

A. This is true, and the method of treatment accorded the item on that exhibit is only for the purpose of first accumulating by columns the accounts to which amounts apply, instead of making all entries to Account 107 and subjecting that col-

(Testimony of John J. O'Neil.)

umn to a subsequent analysis. You will note that at the bottom of the exhibit, after making all proposed adjustments, the accounts which represent predispositions have been restored to Account 107 pending approval by the Commission of their disposition.

Q. Turning to your next adjustment, a transfer of \$161,500 from Account 100.5 to Account 150, Discount on Capital Stock. What about that?

A. As previously outlined, certain of the securities surrendered to American Power & Light Company by Pacific Power & Light Company in the 1910 transfer consisted of \$1,250,000 par value of preferred stock. This stock was sold by American Power & Light Company in various blocks on August 1, 1910, December 30, 1910 and January 31, 1911 and the proceeds realized amounted to \$1,088,500. It follows, therefore, that a [890] discount of \$161,500 was suffered in the sale of this stock and represents an amount properly includible in discount on capital stock. The examiners therefore propose to make this transfer, since the excess of securities over original cost is now stated at par value in the Account 100.5 column of the company's revised study.

Q. Does this amount of \$161,500 appear anywhere on Exhibit 44?

A. Yes, that amount of \$161,500 can be found under the column "Discount on Preferred Stock" second from the right.

Q. Now, will you explain the next adjustment

(Testimony of John J. O'Neil.)

with respect to the Walla Walla Valley Railway Company?

A. Included in Exhibit 37 in the statement of costs to American Power & Light Company are two minor items. One appearing on page 5 of Exhibit 37 in the amount of \$122.00, represents the cost of incorporating the Walla Walla Valley Railway Company. The other, also appearing on page 5 of Exhibit 37, in the amount of \$69.75, represents miscellaneous expenses in connection with the same company. The stock of the Walla Walla Valley Railway Company was transferred from American Power & Light Company to Pacific Power & Light Company in 1910, but was disposed of by Pacific Power & Light Company in 1921. These expenses should have been written off at the time of the sale. The expenses of incorporation [891] and miscellaneous expenses are therefore transferred to Account 107, Electric Plant Adjustments, for disposition.

Q. And the adjustment with respect to the Walla Walla Valley Railway Company appears in the last column of Exhibit 44; is that correct?

A. That is correct. [892]

By Mr. Goldberg:

Q. The next adjustment is entitled, "Excess of Amount paid by Pacific over Cost to American in 1910 Transfer", as a result of which you propose to transfer an amount of \$4,745,748.66 from Account 100.5 to Account 107. Will you explain that adjustment?

(Testimony of John J. O'Neil.)

A. The amount of \$4,745,748.66 represents the excess of the amount recorded in the plant account of Pacific Power & Light Company in 1910 over the cost to American Power & Light Company of acquiring these same properties. The amount is indicated mathematically by reference to the analysis of the statement of cost to American Power & Light Company which indicates total costs of property, including bonds and current positions, of \$6,154,254.34,—and that amount will appear on Exhibit 44—

While the amount established in the plant account of Pacific Power & Light Company, as evidenced by company Exhibit 17, statement B, page 47, was \$10,900,000. The difference between these two figures amounts to \$4,745,745.66 to which should be added \$3 representing three credits of \$1 each appearing on Exhibit 37, the statement of costs to American Power & Light Company, making the mathematical difference \$4,745,748.66, the amount of the adjustment. Essentially, then, this amount represents an excess over cost to American Power & Light Company recorded in the plant account of Pacific. [893]

I have previously reviewed the circumstances surrounding the organization of Pacific Power & Light Company and the then ownership by American Power & Light Company of the entire outstanding common stocks of Astoria Electric Company, Columbia Power & Light Company and Yakima-Pasco Power Company. In June of 1910, Pacific Power & Light

(Testimony of John J. O'Neil.)

Company took over the properties of the three companies. This was accomplished, not by a transfer of the stocks of the three companies, but by a transfer of the properties and current positions and the assumption of certain underlying bonds. For these properties and assets, Pacific Power & Light Company surrendered to American securities aggregating \$10,450,000. These securities consisted of \$1,-250,000 of Preferred Stock, \$3,200,000 of 1st and Refunding Mortgage Bonds, and \$6,000,000 of common stock.

Mr. Laing: Mr. O'Neill, may I interrupt you just a moment? In speaking of what Pacific took over, I think you inadvertently said it happened in June, 1910. That wasn't what you mean to say, was it?

The Witness: Make that July.

Mr. Laing: July, 1910?

The Witness: That is correct.

A. (Resumed) As I have pointed out previously that the cost of the properties to American Power & Light Company, as shown on Exhibit 44, amounted to \$6,154,254.34. [894] That amount, of course, includes the current positions and the bonds that were to be assumed. The actual expenditures made by American Power & Light Company to acquire the stocks of the three predecessor companies was only \$4,749,135.09, as evidenced by Exhibit 37 prepared by that company and submitted to the examiners through Pacific Power & Light Company. This latter amount represented the ac-

(Testimony of John J. O'Neil.)

tual investment of American Power & Light Company. By the formation of Pacific Power & Light Company, and the substitution of the securities of that company for those of the three predecessor companies, American Power & Light Company came into possession of \$10,450,000 par value of securities of Pacific Power & Light Company which represented a cost of only \$4,749,135.09, an excess of par value of securities over such cost of \$5,700,864.91. Subsequently, American Power & Light disposed of the \$1,250,000 par value of Pacific Preferred Stock on which it suffered a discount of \$161,500, and disposed of the \$3,200,000 of Pacific bonds on which it suffered a discount of \$448,616.25. The discounts suffered reduced the spread between par and cost to a spread as between the proceeds of the preferred stock and the bonds plus the par value of the common stock and the investment cost to American. The discounts of \$610,116.25 reduced the previous excess of \$5,700,864.91 to a figure of \$5,090,748.66. In 1921, to compensate for a loss suffered by Pacific Power & Light Company in the sale of the common [895] stock of Walla Walla Valley Railway Company, which was one of the assets originally surrendered in the 1910 transfer, American Power & Light Company donated \$345,000 par value of common stock back to the Pacific Company, reducing the excess to an amount of \$4,745,748.66, the amount of the examiners' present adjustment.

The adjustment may be reviewed in one further

(Testimony of John J. O'Neil.)

light. The initial investment of American Power & Light Company amounted to \$4,749,135.09. From the sale of the Pacific preferred stock it received proceeds of \$1,088,500; and from the sale of Pacific bonds it received \$2,751,383.75, a total of \$3,839,883.75. These receipts reduced American's investment to \$909,251.34 represented by \$5,655,000 par value of the common stock of Pacific Power & Light Company. This excess of \$4,745,748.66 is therefore attributable to the capitalization at par in the plant account of Pacific Power & Light Company \$5,655,000 of common stock which cost American Power & Light Company only \$909,251.34.

This excess is a portion of the difference between original cost and the recorded cost of plant on the books of Pacific Power & Light Company, and is so reflected in Exhibit 17, Revised Statement B, page 47 of the company's report. For proper reclassification of this item, reference is made to the test of Account 107, Electric Plant Adjustments, appearing on page 19 of the Federal Power Commission Uniform System [896] of Accounts, which reads as follows:

“This account shall include the difference between the original cost, estimated if not known, and the book cost of electric plant, at the effective date of this system of accounts, to the extent that such difference is not properly includible in Account 100.5, Electric Plant Acquisition Adjustments. Write-ups of electric

(Testimony of John J. O'Neil.)

plant prior to the effective date of this system of accounts shall be recorded herein."

"The amounts included in this account shall be classified in such manner as to show the nature of each amount included herein and shall be disposed of as the Commission may approve or direct."

In my opinion, the amount of \$4,745,748.66 is a writeup and should properly be classified in Account 107. It represents nothing more than the inflation of the plant account by the same owners. Bona fide cost can only be established between a willing buyer and a willing seller with a resulting change in ownership. There was no sale or purchase of property in 1910 unless a transfer of assets between two pockets of the same owner be so interpreted. Unless that cost be cost to the owner, it is, in the opinion of the examiners, a writeup.

Q. And now, the next adjustment on Exhibit No. 43 is a transfer of \$25,000 from Account 100.5 to Account 150, [897] Discount on Capital Stock. What does that adjustment represent?

A. On July 16, 1930, Pacific Power & Light Company entered into an agreement with American Power & Light Company which provided that Inland Power & Light Company, its wholly owned subsidiary, would sell and convey to Pacific Power & Light Company certain electric and other utility property, and that the Public Service Building in Portland, Oregon, held by Frank A. Reid, nominee of American Power & Light Company, would be

(Testimony of John J. O'Neil.)

sold and conveyed to Pacific Power & Light Company. The agreement, in addition to other provisions, provided for delivery to the Pacific Power & Light Company of all of the outstanding shares (except director's qualifying shares) of common stock of the Inland Power & Light Company, said stock having no par value. As a result of this transaction, the amount charged to the plant account of Pacific Power & Light Company amounted to \$8,156,972.43.

Without attempting to repeat again the opinions expressed previously in this testimony, it will suffice to say that this transaction in 1930 was, similar to the 1910 transfer, entirely between the same owners.

For the properties and stock received, as well as cash of some \$10,829,000, Pacific Power & Light Company issued to American Power & Light Company \$17,000,000 principal amount of First Mortgage and Prior Lien Bonds, 5,000 shares of no [898] par value preferred stock, and affected an exchange of 1,000,000 shares of no par value common stock for 57,550 shares of \$100 par value common stock. Subsequently, the 5,000 shares of preferred stock of a stated value of 500,000 were sold by American Power & Light Company for \$475,000, a discount of \$25,000. For the same reasons as outlined heretofore for the transfer of the amount of \$161,500 in the 1910 transaction, this \$25,000 has been transferred by the examiners to Account 150, Discount on Capital Stock.

(Testimony of John J. O'Neil.)

Q. Now, your next adjustment on Exhibit No. 43 is a transfer from Account 100.5 to Account 107, a credit amount of \$623,767.25 representing an excess of cost paid by American over the amount paid by Pacific. Will you please explain that adjustment ?

A. The reasoning behind this adjustment is exactly the same as that expressed for the 1910 transfer. In the 1930 transfer, the costs to American Power & Light Company were in excess of the amounts paid by Pacific Power & Light Company for the properties and Public Service Building. This is indicated by Exhibit 40, the statement of costs to American Power & Light Company of the properties transferred in the 1930 transaction. The total cost of cash and properties surrendered by American amounted to \$17,855,017.25. From the sale of the \$17,000,000 principal amount of Pacific bonds, American realized \$15,511,250.00. From the sale of the 5,000 [899] shares of Pacific preferred stock, American realized \$475,000. These proceeds reduced the investment of American Power & Light Company to a figure of \$1,868,767.25, for which it received common stock of Pacific Power & Light Company with a stated value of only \$1,245,000. Since the properties were capitalized on the books of Pacific Power & Light Company on the basis of the stated value of this stock, it follows that the properties were recorded on Pacific's books at \$623,767.25 less than the system cost. Therefore this

(Testimony of John J. O'Neil.)

amount becomes a difference between original cost and the recorded cost of plant on the books of Pacific Power & Light Company, and is so reflected in Exhibit 17, Revised Statement B, page 47 of the company's report. The difference in figures will be found to represent the \$25,000 stock discount which has not been set up in the company's statement, Exhibit 17.

In the opinion of the examiner, this amount of \$623,767.25 represents a write-down of the plant account by the same owners, and should be transferred to Account 107.

Q. The next adjustment has to do with the reinstatement of the Fruitvale canal in the amount of \$229,116.81 by transfer to Accounts 100.5 and 110. Will you explain that transaction?

A. The examiners have accepted the amount of \$188,136.86 as representing the amount applicable to the Fruitvale canal, previously retired, and now being restored [900] to service within Account 110., Other Physical Property. The adjustment is made as a matter of principle. The company, in its revised Exhibit 17, has credited this amount back against the reserve for depreciation. The amount retired in 1932 was an estimated amount of \$229,166.81. The company, of course, should have reversed the original retirement in its entirety and reflected the difference between that amount and the adjusted cost of \$188,136.86 in Account 100.5. The examiners' adjustment reverses the credit of \$229,166.81 to Account 107, Electric Plant Adjustments,

(Testimony of John J. O'Neil.)

pending approval by the Commission for its disposition, establishes the adjusted cost in Account 110, Other Physical Property, and places the original excess retirement in Account 100.5.

Q. And the next adjustment on Exhibit 43 relates to unrecorded retirements of non-electric properties in the amount of \$612,013.78, which you are restoring to Account 108, Other Utility Plant. Will you tell us the reason for that adjustment, please?

A. Well, my answer to that would be the same as that given in the previous answer. The amount represents unrecorded retirements of non-electric properties which the Company, in its revised Exhibit 17, has written off against the Reserve for Depreciation. I have restored it to an adjustment account within Account 108, Other Utility Plant, pending approval of the Commission for its disposition. [901]

Q. And would the same be true of the amounts in Account 111, Investment in Associated Companies; Account 140, Unamortized Debt Discount and Expense; Account 151, Capital Stock Expense; and and Account 150, Discount on Capital Stock?

A. That is true. The amounts are acceptable, but the examiners are restoring them to Account 107 until such time as the Commission may approve or direct their disposition.

Q. And the figures which you show at the bottom of the statement on Exhibit No. 43, "as per Commission Staffs" now represent the adjusted figures of the staffs of the Federal Power Commis-

(Testimony of John J. O'Neil.)

sion and the Public Utilities Commissioner of Oregon; is that correct?

A. That is correct.

Mr. Laing: May I interrupt just a moment?

Mr. Goldberg: Yes.

Mr. Laing: It occurs to me, Mr. O'Neill that in your reference to the Fruitvale canal as to what account that Fruitvale canal should be placed in,—that is, restored to its proper status, that you referred to both Account 108, which is Other Utility Plant, and Account 110, Other Physical Property. My impression is that you probably intended to refer in both of those cases, wherever that came up, to Account 110, did you not?

The Witness: That is correct, 110, Other Physical property. [902]

Mr. Laing: Account 108 is not involved in that particular piece of property?

The Witness: That is correct, Mr. Laing.

By Mr. Goldberg:

Q. Have you prepared, Mr. O'Neil, an amended reclassification summary statement reflecting these additional adjustments? A. I have.

Q. I show you a tabulation entitled, "Pacific Power & Light Company, Amended Reclassification Summary Statement Reflecting Adjustments of the Staffs of the Federal Power Commission and Public Utilities Commissioner of Oregon". and ask you if that is the statement you have just referred to?

A. It is.

Mr. Goldberg: May I have this statement marked

(Testimony of John J. O'Neil.)

for identification with the next exhibit number, Mr. Examiner?

Trial Examiner: It will be marked for identification Exhibit No. 45.

(The Document Referred to Was Marked Exhibit No. 45 for Identification.)

By Mr. Goldberg:

Q. Do you have any explanation you wish to make with respect to that Exhibit No. 45, Mr. O'Neil?

A. It would be well to make two or three explanatory comments with respect to that exhibit. The first column [903] which is headed "As per staffs' report Exhibit 16" is taken directly from Schedules II and III appearing on pages 22 and 42, respectively, of that report, and represents the company's reclassification and original cost study as first adjusted by the staffs in their report which is Exhibit 16 in this case.

Column two, which is headed "Additional Proposed Adjustments", represents the adjustments made by the Commission staffs as a result of the studies made by the Company in accordance with the recommendations made in the staff report.

Column three, which is headed "As Adjusted" now represents the adjusted figures of the staffs of the Federal Power Commission and the Public Utilities Commissioner of Oregon.

With respect to Account 100.1, Electric Plant in Service, there has been added the \$4,559.68 of additional organization expenses. No changes were necessary in Account 100.2, Electric Plant Leased to

(Testimony of John J. O'Neil.)

Others, or Account 100.3, Construction Work in Progress. There has been established in Account 100.5, Electric Plant Acquisition Adjustments, an amount of \$2,741,591.66. Account 107 has been adjusted to an amount of \$6,420,800.61.

With respect to Account 108, Other Utility Plant, there has been established in that account an amount of \$200,812.34 which represents the estimated original cost of the Prineville water system, the Kennewick water system, and the Yakima steam heating system. That amount is in agreement with the amounts [904] submitted by the company.

With respect to the amount of \$7,888.76 established in the Other Utility Plant Acquisition Adjustment Account, that represents the portion of the 1910 acquisition adjustment applicable to the Kennewick water system, which is still in service.

The amount of \$612,013.78 which has been established in the Other Utility Plant Adjustment Account represents unrecorded retirements of non-electric properties as determined by the Company.

The amount of \$2,468,068.52 established in Account 110, Other Physical Property, is in agreement with the amount submitted by the Company.

Q. With respect to the amount of \$2,741,591.66 which you have established in Account 100.5, Electric Plant Acquisition Adjustments, have you prepared an analysis showing the various acquisitions to which this amount applies?

A. I have. This analysis has been prepared in such manner as to indicate not only the analysis of

(Testimony of John J. O'Neil.)

the amount of \$2,741,591.66, but also the application of each of the examiners' adjustments to the amounts as originally established in Account 100.5, Electric Plant Acquisition Adjustments, by the Company.

Q. I show you a tabulation entitled, "Pacific Power & Light Company, Analysis of Account 100.5, Electric Plant [905] Acquisition Adjustments, January 1, 1937," and ask you if that is the statement you have just described?

A. That is correct.

Q. You prepared that statement? A. I did.

Mr. Goldberg: I would like to have the tabulation just described, marked for identification with the next exhibit number, Mr. Examiner.

Trial Examiner: It will be marked for identification Exhibit No. 46.

(The Document Referred to Was Marked Exhibit No. 46 for Identification.)

By Mr. Goldberg:

Q. Now, with respect to the amount which you have established in Account 107, of \$6,420,800.61, have you prepared an analysis of that account?

A. Yes, I have. The analysis has been prepared in such manner as to show the nature of each item in that account and the amount.

Q. I show you a statement entitled, "Pacific Power & Light Company, Analysis of Account 107, Electric Plant Adjustments, as Adjusted by Commission Staff," and ask you if that is a statement

(Testimony of John J. O'Neil.)

you prepared and to which you have just referred?

A. That is correct. [906]

Mr. Goldberg: Mr. Examiner, I ask that this statement be marked for identification as the next exhibit number.

Trial Examiner: It will be marked for identification Exhibit No. 47.

(The Document Referred to Was Marked Exhibit No. 47 for Identification.)

By Mr. Goldberg:

Q. Mr. O'Neil, will you please turn to Exhibit 17, Revised Statement B, page 39. Do you have that page? A. I have.

Q. You will notice the following statement at the top of that page, the first full paragraph:

"The original cost of the distribution system obtained from the City of Ione for the purposes of this statement is assumed to be \$3,526.71, the cost of the system to the Sherman Electric Company."

Have you accepted the amount of \$3,526.71 as the estimated original cost of this distribution system? A. I have, yes.

Q. And what is your reason for accepting this purchase cost as the estimated original cost?

A. There are no other records or figures available to ascertain more accurately the original cost. Therefore, the purchase cost has been accepted as the closest approximation of the original cost. If records were available showing [907] the original

(Testimony of John J. O'Neil.)

cost of this property, purchase cost would not be acceptable, and the original cost would have been used.

Q. Mr. O'Neil, do you have any other comment to make with respect to these statements or the Company's revised Exhibit 17?

A. Yes, there is one thing I would like to say. The company, in its restudy of acquisition, has made certain allocations of the difference between the determined original cost and the cost to American as between electric utility and non-electric utility properties. The staff, upon examination of the Company's allocation, deemed it to be arbitrary and proceeded to make other allocation studies on the basis of earnings, reproduction cost new, reproduction cost new less depreciation, and original cost. After considering all of the various allocation methods, the staff is of the opinion that the results of the Company's study represent a reasonable allocation of the acquisition adjustments, and although we are not in accord with the method used, the results thereof can be accepted.

Mr. Goldberg: That is all we have of Mr. O'Neil, Mr. Examiner, and at this time I would like to offer in evidence Exhibits numbers, marked for identification, as Exhibit Nos. 43, 44, 45, 46, and 47.

Mr. Laing: There is no objection.

Trial Examiner: Very well. Exhibits 43 to 47, inclu- [908] sive, will be received.

(Exhibit Nos. 43, 44, 45, 46 and 47 were received in evidence.) [909]

HEARING EXHIBIT No. 44

PACIFIC POWER & LIGHT COMPANY

ANALYSIS OF COSTS INCURRED BY AMERICAN POWER & LIGHT CO. IN 1910 TRANSACTION

	Total	Columbia Power & Light Company	Yakima-Pasco Power Company	Astoria Electric Company	Wasco-Whew. Milling Company	Yakima Land	General	Organization of Pacific Power & Light	Interest Accd By American P & L Co	Debt Dist. and Expense	Dist. on Preferred Stock	Walla-Walla Valley Railway Co.
Direct Purchase Costs.....	\$4,542,872.94	\$1,792,540.89	\$2,106,632.05	\$340,000.00	\$300,000.00	\$3,700.00	\$	\$	\$	\$	\$	\$
Bonds Assumed	967,000.00	607,000.00	210,000.00	150,000.00								
Current Position	(14,500.00)	(29,147.07)	23,000.26	(8,353.19)								
Walla Walla Valley Ry Co. Stock.	(154,500.00)	(154,500.00)										
Purchase Costs	\$5,340,872.94	\$2,215,893.82	\$2,393,632.31	\$481,646.81	\$300,000.00	\$3,700.00						
Other Acquisition Costs.....	136,746.40	10,503.27	2,495.17	3,564.23	1,340.00		118,842.41					
Allocation of General Costs	—	54,668.00	57,044.00		7,130.00		(118,842.41)					
Miscellaneous Costs	676,635.00							5,650.39	54,942.96	454,349.90	161,500.00	191.75
Total Cost to A. P. & L. Co.....	\$6,154,254.34	\$2,281,065.09	\$2,399,171.48	\$485,211.04	\$308,471.73	\$3,700.00	\$	\$5,650.39	\$54,942.96	\$454,349.90	\$161,500.00	\$ 191.75



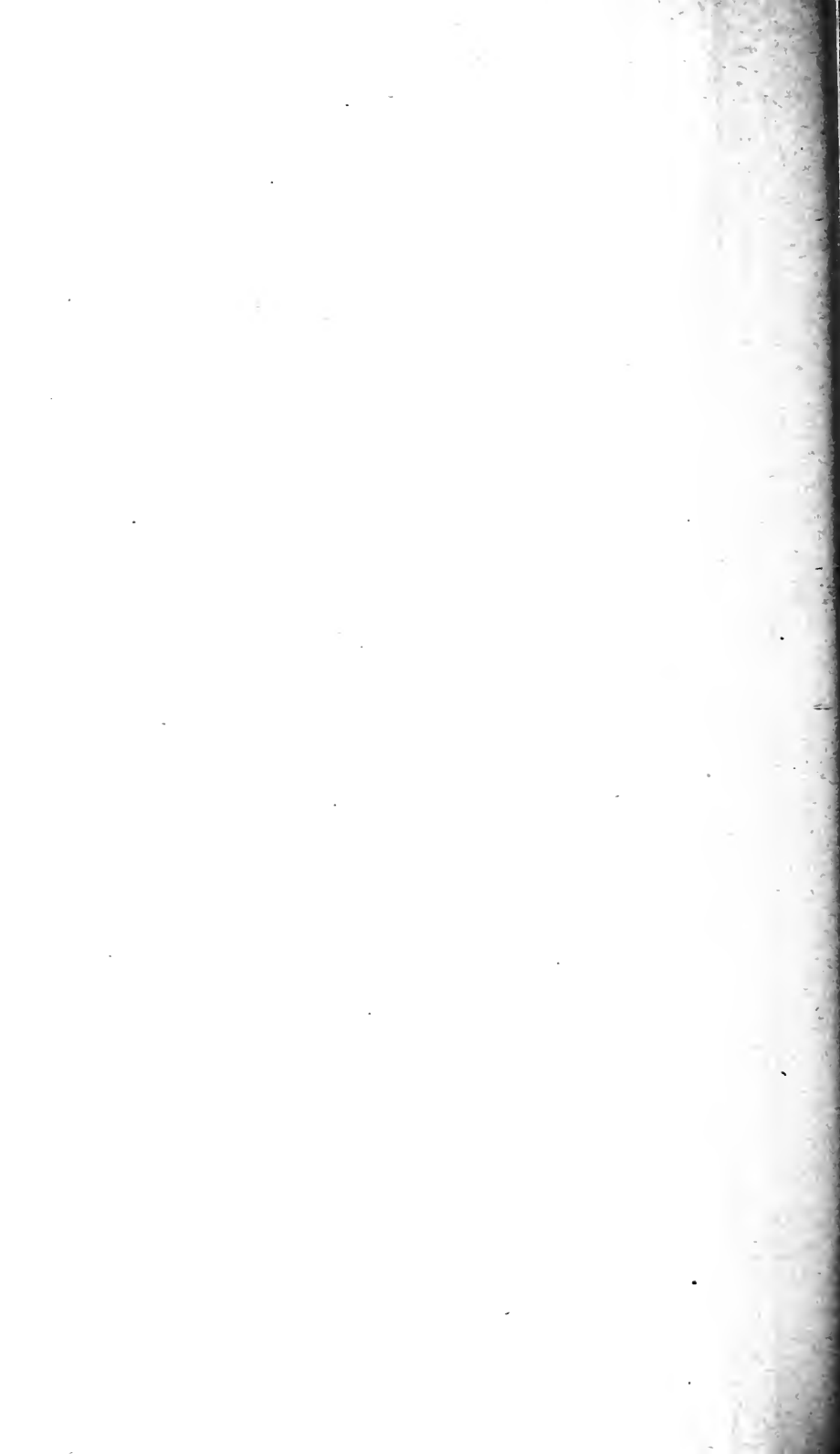
HEARING EXHIBIT No. 46

PACIFIC POWER & LIGHT COMPANY

ANALYSIS OF ACCOUNT 100.5, ELECTRIC PLANT ACQUISITION ADJUSTMENTS

JANUARY 1, 1937

	As per Company Reclassification Sum- mary Statement	Organization Expense Trans- ferred to Acct 100.1	Debt Expense Trans- ferred to Acct 107	Discount on Preferred Stock Trans- ferred to Acct 107	Excess of Amount Paid by Pacific Over Parent Co. Cost Trans- ferred to Acct. 107	Expense of Walla Walla Ry. Transferred to Acct. 107	Adjustment of Excess Retirement of Fruitvale Canal Property	As Adjusted by Commission Staffs
Columbia Power & Light Company, Yakima-Pasco Power Company and Astoria Electric Company....	\$6,239,335.19	(\$ 4,559.68)	(\$ 5,733.65)	(\$161,500.00)	(\$4,745,748.66)	(\$ 191.75)		\$1,321,601.45
Husum Power Company.....	23,759.81							23,759.81
Prosser Power Company and Prosser Water Company	5,738.56							5,738.56
Klickitat Light & Power Company.....	1,080.35							1,080.35
Hood River Light & Power Company.....	164,979.19							164,979.19
Tucannon Power Company.....	39,260.64							39,260.64
Dayton Electric Company.....	40,648.17							40,648.17
Waitsburg Electric Light Company.....	(5,873.41)							(5,873.41)
Reservation Electric Company.....	9,158.42							9,158.42
Hydro Electric Company.....	115,718.63							115,718.63
Seaside Light & Power Company.....	21,683.76							21,683.76
Gearhart Park Company.....	77.60							77.60
Cannon Beach Electric Company.....	1,512.62							1,512.62
Inland Power & Light Properties.....	486,744.98			(25,000.00)	623,767.25			1,085,512.23
Connell Power & Light Company.....	12.26							12.26
Misc. Acquisition Costs.....	14,177.27							14,177.27
Retirement Adjustments.....	(138,485.84)						\$41,029.95	(97,455.89)
Totals.....	\$7,019,528.20	(\$ 4,559.68)	(\$ 5,733.65)	(\$186,500.00)	(\$4,121,981.41)	(\$ 191.75)	\$41,029.95	\$2,741,591.66



Mr. Laing: There are two or three questions on redirect that I wanted to ask Mr. Neill, and I thought this would be a better place to get that out of the way, before I go ahead with the cross examination.

Whereupon,

WILL T. NEILL

called as a witness on behalf of the Pacific Power & Light Company, having been previously sworn, resumed the stand and testified further as follows:

Redirect Examination

By Mr. Laing:

Q. Mr. Neill, in the course of your cross examination by Mr. Slaff, you were asked some questions about the usability of this Uniform System of Accounts to a practical operating man, and your opinion concerning the use of this [911] System of Accounts as reflecting the cost of the utility properties to the person who first applied the property to utility use, and you discussed that at some length with Mr. Slaff.

I would like to ask you whether your comments in response to his questions comprehended all your objections to this Uniform System of Accounts as it is being applied and interpreted by the Commission?

A. As I understood Mr. Slaff's questions at the time, and as they appear to me now after reading the transcript, the questions and answers were ad-

(Testimony of Will T. Neill.)

dressed to the practical usability from an operating standpoint of that part of the classification which operating men have to deal with; to the possible value to operating men and others of information as to cost to the first persons to apply the property to utility use; and to the possibility of reasonable differences of opinion between the Commission's staff and myself as to the manner in which the System of Accounts should be interpreted. These questions did not cover the whole scope of the situation as I see it—and at all events they do not cover what in my judgment is the most serious objection to the System of Accounts as interpreted and applied by the Commission.

Q. What is the most serious objection you have in mind, Mr. Neill? [912]

A. The most serious objection to the System of Accounts as interpreted and applied by the Commission, as indicated by its definitions under Accounts 100.5 and 107, and by its show cause order in this present case, and by rulings it has made elsewhere, is its apparently definite determination to employ what we in the utility industry have called the "aboriginal cost" or the cost to the first person to apply the property to utility use as a basis for ordering the writing off of amounts from the plant accounts of utility, without giving any consideration to the value of the properties which are included in the plant accounts.

I do not pretend to be an accountant or a lawyer,

(Testimony of Will T. Neill.)

but it seems to me that this is arbitrary, especially when applied retroactively as the Commission has indicated its intention to apply it, and in my judgment is beyond the reasonable scope or purpose of any system of accounts. [913]

Mr. Laing: I think that is all the questions I have of Mr. Neill.

Recross Examination

By Mr. Slaff:

Q. I have a few questions that I would like to ask at this point. [926]

Q. Now in connection with the questions which Mr. Laing has asked you at the very outset, you said, as I recollect, paraphrasing what he said, that the most serious objection to the System of Accounts as interpreted and applied by the Commission was the apparent definite determination to employ what you call "aboriginal costs" as the basis of ordering the writeoff of amounts on the balance sheet, without giving consideration to present values which exist in the property.

Now, in the first place, that is essentially a financial matter rather than an operating matter, is it not?

A. Yes, I should say that is financial and legal.

Q. You will recollect, Mr. Neill, when I put to you [927] some problems at pages 649 and 650 which dealt with the possibility, to illustrate the principle, of the creation of Pacific Power & Light Company No. 2 by American to take over the assets of the present Pacific Company, that is, to assume a deter-

(Testimony of Will T. Neill.)

mined fair value of some \$6,000,000 in excess of the amount now on the books of Pacific, and I asked you if you approved such a transaction, and what your views were with respect to such a transaction, and you answered at page 650:

“Well, I really don’t feel capable of answering the question, because of my lack of knowledge of all the factors involved.”

And then, continuing, on page 651:

“Q. Do you mean that the answer which you would give after reflection on the problem would be valueless to us and to the Commission in arriving at a conclusion with reference to the problem that confronts us in this case?

“A. I very definitely feel that, having had no experience in financial matters of that kind, I cannot answer the question.”

And then when the question was repeated in somewhat different form, but containing the same substance, on page 652, you stated:

“That is the part of the question I don’t feel capable of answering. I would be glad to, if I knew. But that situation, as I see it, in so far as my part of it is concerned, [928] would require careful study and consultation with somebody that was expert on these matters, both as to their actual operation and with respect to the regulations that pertain to it, and all other phases of it. I am trying to answer the questions the best way I can, and I am not trying to avoid it.”

Now, is there anything that distinguishes the na-

(Testimony of Will T. Neill.)

ture of this question that I put to you and the question that Mr. Laing put to you?

A. The thing I wanted to clear up in this particular question that Mr. Laing asked me and my answer concerning the matter which we had discussed, is that when we were discussing the classification the other day, it was my understanding at that time that we were discussing it—at least I was making my answers on the basis of my conclusions as to the reclassification on the operating use of the classifications. I didn't want that misunderstood.

Q. Then, as I understood you in your answer to Mr. Laing this morning, you went beyond that phase of that use of the System and said, as I gathered, as a financial matter you considered that the Commission's apparent determination to order writeoffs or writeups because of the present value is arbitrary: is that what you meant to say? Is that your position?

A. As I see it, of course, the refusal or failure [929] of the Commission to take into account the present value of the property in any disposition that is made of it seems to me to be arbitrary. It even seems to me to be that, although, as I say, I am not a financial man or a lawyer: it has always seemed to me that the value of an asset should be given consideration.

Q. Has it always seemed to you that the present value of an asset should be recorded on the balance sheet of the accounting company?

(Testimony of Will T. Neill.)

A. No, I don't think that is right.

Q. Isn't that essentially the problem with which we are concerned here, as to what should appear on the balance sheet of a company?

A. Well, I think that is the question, as to what is on the balance sheet and what is to be taken off; and when we come down to the final disposition, that is——

Q. (interposing) You certainly do not recommend or countenance changing the balance sheet in accordance with changes in value of the property reflected on the balance sheet?

A. Well, there again we are coming into the financial phase of it.

Q. Mr. Neill, I was very glad to have us get away from this the other day, but apparently we are back into it. The other day you stated you were not an expert on any of [930] these matters, but, unfortunately, you have raised the question again this morning, so I am compelled to pursue it a little bit further with you.

A. Well, I still feel that I am not able to go into all the phases of what should or should not be done on the balance sheet.

Q. Well, let us put it this way, in a somewhat different form: You disagree and have, from your point of view, an honest and reasonable disagreement and difference of view with the Commission, as you interpret the Commission's action as to the matter of disposition of writeups and similar mat-

(Testimony of Will T. Neill.)

ters, and as to how they should be handled? Is that correct?

A. Just from my point of view it seems to me that the whole consideration of that, I might say, from purely a layman's point of view should not ignore the assets; that is, the assets should be considered; that is without respect to the legal concepts or the principles of fundamental accounting, with which I am not familiar.

Q. That statement as to your point of view is thoroughly understandable. Now, I want to take you through the next step and discuss what you have stated, and ask you to reflect on it; do you consider the Commission's difference in point of view and approach to the problem and ultimate treatment of the problem as you treated it, is arbitrary? Do you consider that is an arbitrary action by the Commission? [931]

A. Well, it seems to me, as I see it, from my point of view as an operating man, that the failure or refusal of the Commission to consider what the values are today, regardless of what disposition may be made after that, is arbitrary.

Q. When you say the failure of the Commission to consider the values, are you confining yourself solely to the balance sheet disposition of these writeups and staying out of the field of these present values, which might be considered for other purposes, such as rate-making, or whatnot?

A. Well, as I see it, so far as the classification—I was not trying to speak as an expert on financial

(Testimony of Will T. Neill.)

matters. I have been trying to make a distinction that, so far as the classification is concerned itself, and taking what is on it and pigeonholing it, as I see it, there is no serious question about that. I might not think it is right in some details. But as to this other question, after having gotten some of these things in the pigeonholes, what are you going to do with them, without giving consideration to all the ultimate elements of value; if you are going to do that, without giving any consideration to these elements of value, that seems somewhat arbitrary. But, again, it comes down to a question of law on that particular point.

Q. You can recognize, can you not, the Commission's approach to this problem, or what you conceive to be the [932] Commission's approach to this problem as a serious and reasoned effort, although you may disagree with it—as a serious and reasoned effort to arrive at a desirable end?

A. Well, it just does not seem right to me. As I say, I am not a lawyer or a financial man, but it does not seem right to me not to take into consideration at the time all the facts which may be available as to values today. What is done after that is taken into consideration as a matter of law, I presume.

Q. Well, let us explore that for just a minute, because I am interested in **getting your approach** to it. Suppose you, today, were in charge of a utility which was not regulated by a regulatory commis-

(Testimony of Will T. Neill.)

sion, and not regulated by the Federal Power Commission, and the plant had an out-and-out writeup on the books, as you have defined a writeup; and let us suppose that that writeup had been placed on the books a year ago; and then you come under the jurisdiction of the Federal Power Commission this year, and you are ordered to reclassify your properties; supposing further that in the past year the value of your properties, just in that one year, had caught up with the writeup that you originally disapproved of; would you say that it was an arbitrary action on the part of the regulatory body to order the writeup removed from your books and disposed of without considering the fact that, in the last year, your so-called value of the [933] property had caught up with that writeup? Do you get the sense of that question, Mr. Neill?

A. That is just a little bit involved, as to how we started.

(Thereupon, the question referred to was read aloud by the reporter as above recorded.)

Q. We just started out last year with a company that was outside of regulation, outside of state regulation and outside of the Federal Power Commission regulation, and last year the plant had an out-and-out writeup put on the books of the company.

Trial Examiner: I think it is important, Mr. Slaff, that the writeup be confined to what Mr. Neill's previous definition was as to writeup.

(Testimony of Will T. Neill.)

Mr. Slaff: Sure. Just the way he defined "writeup".

By Mr. Slaff:

Q. Say, within the next year you come within the Federal Power Commission's regulation, and within that year the values have caught up with the writeups; do you think it would be arbitrary on the part of the Federal Power Commission to order that writeup written off of the books of the Company without considering the fact that in the last year the values, so-called, had caught up with the writeup?

A. Well, it seems to me that it would; that is the way it appears to me, if I understand the situation. [934]

Q. Well then, in effect, Mr. Neill, aren't you backtracking on your original position saying that you can't justify an out-and-out writeup, as you yourself defined "writeup", so long as subsequent to that writeup, values, so-called, catch up with the writeup?

A. As I say, I am not an expert accountant nor a lawyer. I don't know what the proper thing to do is, but it seems to me the fact that the value is there should be given consideration. That is about as far as I can go.

Q. Let me take up this situation then. You have got a certain amount written on the books at original cost, today, and yet, today, you find that you have two million dollars more value there than

(Testimony of Will T. Neill.)

that cost; why don't you approve the writeup on the books to your value?

A. Well, that is getting into a field where I don't have the knowledge.

Q. That is the sort of transaction, Mr. Neill, that you said, as I recollect your testimony, you did not approve; that is correct, isn't it?

A. Well, I think, from my present knowledge, probably I have said that. As I say, we are getting into a field of finance and accounting that I don't feel myself competent to handle.

Q. What I am trying to get at is how, if you don't approve of that type of transaction, you can consider it [935] arbitrary by a regulatory commission to order that transaction corrected?

A. Well, I tried to explain awhile ago, from my point of view, just the—of course, the legal concept is involved, the refusal of the Commission to consider the facts at all is the thing that seemed to me to be arbitrary.

Q. Let us put it another way: Suppose the Commission assumed that the so-called value existed but, nevertheless, determined that the balance sheet should be stated at cost, the arbitrary write-up disposed of, and written off: would you consider that arbitrary?

A. After they have given consideration to the values?

Q. Sure. The Commission has assumed that the statement of existing values is as made and that existing values have caught up with the writeup.

(Testimony of Will T. Neill.)

but, nevertheless, the Commission comes to the conclusion that the balance sheet should not show the writeup, and the writeup should be disposed of.

A. Well, I think that, again, whether we use the term "arbitrary" or something else is something that comes down to a question of law on the subject and, of course, I am not a lawyer.

Q. Well, of course, you are the one who brought in the word again, "arbitrary"; you said you considered some things as arbitrary. I stated that I can understand your [936] approach, and that you have reasonable grounds, from your point of view, to differ in such cases from regulatory bodies; but I think it important to determine whether you conclude that such action by the regulatory commission is or can be considered properly as arbitrary.

A. Well, I don't know whether I can explain my feeling any better than I have; it just looks to me that it doesn't seem right when you do not give full consideration to present value; from that point on I think it becomes a point of law.

Q. Well, my last hypothesis, Mr. Neill, was assuming that the Commission had considered the present value.

A. I understand that.

Q. And had come to the conclusion that the present values were as represented, but, nevertheless, had come to a conclusion that sound accounting requires that the balance sheet be on a cost rather than on a present value basis. You couldn't very well call that arbitrary, could you?

(Testimony of Will T. Neill.)

A. It might not be arbitrary, assuming that the Commission comes to that conclusion; as I say, from that point, regardless of what you term it, it is a matter of law on that particular subject.

Q. Well, is it fair, Mr. Neill, to summarize that, in part, by saying, or by considering what you have told us, with your limitations with respect to financial matters, that you are not a lawyer, but just a good operating man,— [937] even though you modestly cavil at that term “good”—that the action of the Commission in such a situation such as we have been discussing is arbitrary? Would you say it is or is not arbitrary?

A. I think, to the extent that I have tried to explain my personal view about it, it would be. To go any further than that would be, as I stated, going into the field of law or accounting. I don't see that I can do much more with it.

Mr. Slaff: I guess that is all. [938]

JOHN J. O'NEIL

called as a witness on behalf of the Commission, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination

By Mr. Laing: [939]

Q. I would like to have you point out generally, Mr. O'Neil, dealing with your Exhibit 43 and the grouping at the next to the last line of these accounts

(Testimony of John J. O'Neil.)

which you are clearing through 107,—from the standpoint of presenting the information to the Commission, does not the presentation of reclassification statements in the form submitted by the Company give the Commission all of this information in identifiable form just as clearly as it would or as you have done it by clearing the amounts through Account 107?

A. That is probably true, Mr. Laing. The only exception that I could make to your statement would be this, that by the inclusion of those items in 107, as provided by the account, the same information which was given by your Company in showing them in the other balance sheet accounts on, for instance, Statement E of your report, could also have been accomplished in your Statement H where you dispose of 107 by indicating in Statement H the account to which you evidently intended to dispose of items in 107.

Q. But there is no objection to the presentation [940] in the form that the Company presented it, is there?

A. Oh, I don't believe there is any objection as far as the amounts were concerned. It is merely a matter of passing them through 107.

Mr. Laing: I might say also at this point that we have no criticism of any computations made in any of Mr. O'Neil's exhibits as to the figures used as a basis for the calculations. We have not noted any discrepancies in the figures and have no reason to quarrel with any of the computations mathe-

(Testimony of John J. O'Neil.)

matically. Our differences will be only as to the premises or assumptions on which they may be based.

By Mr. Laing:

Q. I wish you would refer to the transcript. I will see if I can find the place. Beginning at page 883, line 23, there are two sentences there I would like to refer to first. After referring in the general introductory statement to the organization of the Pacific Power & Light Company in 1910 you go on as follows, which I quote:

“The securities issued by Pacific Power & Light Company represented the entire amount of securities then outstanding. It follows from the nature of this transaction that there was no change in the ownership of the properties.”

Now, am I to understand or are we to understand when you make that statement that you are referring to the exact [941] moment of the transfer of the properties to the Pacific and the issuance of the securities back to American, when you say there was no change in the ownership of the property? As of what moment of time are you speaking?

A. Well, I say that the transaction itself effected no change in the ownership of that other property. By that I mean that the transaction of itself did not effect a change in the ownership of the property.

Q. You mean at the moment when that took place?

A. At the moment or subsequently or prior.

Q. Do you make any distinction—I don't want to

(Testimony of John J. O'Neil.)

be confusing—do you make any distinction in your mind between the moment when the American passed over the deeds or title papers on the one hand and took back a lot of securities on the other, the particular moment of transfer, and we will say a period of six weeks or two months after that?

A. I am having a little bit of difficulty in understanding the question. I was wondering——

Q. (interposing) You make a categorical statement there that there was no change in the ownership of the properties, and you predicate that on the previous statement that the securities issued by the Pacific represented the entire amount of securities then outstanding, the assumption being that the securities went over to American. [942]

A. That is right.

Q. Now, what I am asking is whether, when you say there was no change in the ownership, you are referring to the moment when American had passed over the properties to Pacific and had taken back securities and they were still in the box or cash drawer of American? Do you make any distinction between that situation and what occurred within a reasonable time thereafter when some of those securities became owned by bondholders and others became owned by preferred stockholders, the American merely retaining then the common stock?

A. I am definitely drawing that distinction, Mr. Laing. Or I will say that as it affects this transaction, the interpretation that might be read into this particular sentence of mine was to indicate that

(Testimony of John J. O'Neil.)

five minutes before the transaction occurred the properties were owned by American, that the consummation of this particular transaction did not change the fact that American owned it thereafter, and as far as the subsequent disposition of bonds or preferred stock was concerned, to that extent you might say that that did not exactly change the nature of the ownership of the properties. It became a liability of the Pacific Power & Light Company at the time the securities were originally issued, but were merely transferred by American to the public. [943]

Q. But the status of American's ownership was not the same six months afterwards as it was six minutes after, was it?

A. Mr. Laing, you are referring to the subsequent sale of the bonds and preferred stock?

Q. That would certainly be one of the elements I would have in mind.

A. Well, to the extent that the proprietorship interest—maybe we have a little difficulty there. But as far as the bonds are concerned, I look upon them more as a liability than as a turning over of money; whereas as far as the common stock is concerned, why, I would like to always consider it as being a proprietorship interest.

Q. Well, the common stock, of course, represents the ultimate equity in the property, does it not?

A. That is correct.

Q. And the extent of that equity, so far as the American Power & Light Company is concerned, was very materially affected, was it not, by the

(Testimony of John J. O'Neil.)

transaction that created the Pacific Power & Light Company and turned over to it various assets in exchange for which the American Company got back certain securities and passed them along to the public? In other words, prior to the transaction American, we might say, had the entire ownership and the entire property, Mr. O'Neil, did it not? [944]

A. That is correct.

Q. And after the transaction American's interest consisted merely in the equity over and above the rights and interests owned by the bondholders and next the rights and interests applicable to the holders of the preferred stock? Is that correct?

A. That would be correct.

Q. So that there was not the same kind of ownership or the same completeness of ownership or the same identity of ownership on the part of American prior to the transfer as compared with the conditions, we will say, three months afterwards, was there?

A. No.

Q. And then, of course, there was a change in the legal status of the ownership too, was there not, that is, when the properties passed out of the possession and control of American, through the subsidiaries in which it then held an interest, and which transferred their properties to the Pacific, that definitely created a change in the legal status of whatever interest American had, did it not?

A. There was a new corporate entity formed, but just how that change from a legal standpoint

(Testimony of John J. O'Neil.)

might affect the accounting viewpoint. Mr. Laing, I don't think I am qualified to tell you.

Q. I don't want to go into detail about it beyond [945] merely calling your attention to the fact that there was a very definite change in the legal status of the ownership of those properties. That is obvious, isn't it, by the transfer?

A. Again, if you take a layman's viewpoint. I would say there was a legal entity created.

Trial Examiner: The hearing will take a recess of five minutes.

(Whereupon, a short recess was taken after which proceedings were resumed as follows:)

Trial Examiner: The hearing will be in order.

By Mr. Laing:

Q. In addition to these bonds and preferred stock of the Pacific that came over to American in July of 1910 or August 1, 1910, whatever date it was, and which then went out to the general public, there were other securities which held rights and interests against the Pacific properties at the time of the transfer, were there not,—after the property was transferred?

A. You mean there were the \$967,000 of underlying bonds?

Q. Yes. A. That is correct.

Q. Those people had rights and interests which they could assert against the administration of those properties [946] in the hands of the Pacific Company, do they not?

(Testimony of John J. O'Neil.)

A. I believe that is correct.

Q. So that I think we have agreed that the status of the properties, both as to ownership and as to the rights of third parties in the properties, were substantially altered by the transfer from the American to the Pacific, have we not?

A. You mean, Mr. Laing, by the subsequent sale of bonds and preferred stock?

Q. Yes.

A. To the extent that the properties were mortgaged, I would say to that extent that there was a change in the rights.

Q. And the Pacific Company, for its own account, entered into covenants with those bondholders which could be enforced as against the Pacific Company as a separate corporate entity, isn't that a fact?

A. That is correct.

Q. And these preferred stockholders, while for a long period of time at least in the minority, did have voting rights share for share with the shares of the common stock that were issued, did they not?

A. That is right.

Q. And even as minority stockholders they would have certain rights which they could enforce against the [947] Pacific Power & Light Company as far as it pertained to the administration of the Company's business and the Company's earnings, isn't that true?

A. They would have a minority voice in the affairs of the Company.

Q. So that when you use the statement that

(Testimony of John J. O'Neil.)

through the medium of complete common stock ownership American Power & Light Company owned and controlled Pacific Power & Light Company after the transfer, you use the word "controlled" in the sense that they had voting control by the election of directors, do you not?

A. I used the word "controlled" in that particular instance, Mr. Laing, more in conformity with the definition as used in the definition of Uniform System of Accounts, but to answer your specific question, that is implied, the voting control.

Q. That is the control which was represented by having a majority of the votes at the stockholders meeting?

A. That is one of the elements of control.

Q. Well, what other elements are there?

A. Well, the majority of voting stock does not necessarily constitute the only element that makes for control. I mean, one corporation might control another through the medium of minority stock ownership.

Q. Yes, assuming that minority ownership were large [948] enough to attract to itself other stockholders who would vote with them at a stockholders meeting,—is that what you mean?

A. Either that or a consolidated minority block as opposed to a scattered majority.

Q. But in essence it boils down to the fact that the fellow who has control is the fellow who shows up with enough votes at the stockholders meeting to elect directors. Is that not a fact?

(Testimony of John J. O'Neil.)

A. That has very, very often happened, Mr. Laing.

Q. Well, is there any other way that the control can be exercised?

A. Yes, I can read several for you.

Q. Go ahead.

A. It probably would be will under the circumstances to give the exact definition given by the Uniform System of Accounts and by which I am constantly motivated in referring to the word "control". As indicated on page 4 under Definitions of Uniform System of Accounts, under 5-B—have you the page?

Q. Where does it appear?

A. 5-B (Reading) " 'Control' (including the terms 'controlling', 'controlled by', and 'under common control with') means the possession, directly or indirectly, of the power to direct or cause the direction of the management [949] and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, associated companies, contract, or any other direct or indirect means."

Q. Now, that is your general definition of "control", which you say represents your bible when you use the word in this sort of a discussion?

(Testimony of John J. O'Neil.)

A. Definitely.

Q. As applied to the Pacific Power & Light Company, the control or such control as the American may be said to have had, after the creation of this separate corporation and after these bonds and preferred stock went out to the public, was exercised by American's predominant voting right position at stockholders meetings, was it not?

A. I think in the case of American the voting stock control was the major element of the definition of control.

Q. And they would exercise that control by being able to elect directors who were satisfactory to it at stockholders meetings? Is that in effect what that amounts to?

A. I will point this out, that the exercise of that control is not necessary to my definition. The power to [950] exercise that control is sufficient, and I believe in the case of American they did exercise that power.

Q. Well, they voted at the stockholders meetings, we assume.

A. That is right.

Q. And by the "power to exercise that control" you mean they had power to veto election of any director that they did not approve of?

A. That is correct.

Q. And that would be true in any case where one person or one corporation owned a sufficient block of stock of another corporation so that he has a predominant position at a stockholders meeting, is that true?

(Testimony of John J. O'Neil.)

A. That is correct. Where you get beyond the pale of a predominance of voting of stock ownership, the matter of control of the Company becomes entirely factual.

Q. So that when you are speaking of the word "control" you used it in that sense, but when it comes to the matter of ownership, you are necessarily limiting your statement, are you not, to the fact that the American, after the transfer and after the securities had gone out and had been distributed, owned merely what was in effect a third or a fourth table position in the actual property ownership of the Company, are you not? That is, we had here certain underlying bonds that had a prior lien on certain parts of [951] of the property; we had the Pacific Power & Light Company's own bonds which, subject to the underlying bonds, had certain rights in the property; and we had after that the preferred stock which, as to liquidation and as to earnings, came ahead of the common stock, did we not?

A. That is correct.

Q. And the ownership of American at that point is limited to what is left after other prior claims are taken care of, is that true?

A. That is correct.

Q. And, of course, the record shows in this case, does it not, that immediately after this July, 1910 transaction was consummated the actual administration of the Pacific Power & Light Company was

(Testimony of John J. O'Neil.)

under the direction of the Board of Directors, the majority of whom lived in the Pacific Northwest and whose meetings were held in the Pacific Northwest, isn't that true?

A. That is true. I was wondering if there might be any implication in that question that that placed it beyond the control range.

Q. No, all that I wanted to call attention to was the fact that certainly after this meeting which we have talked about where this transaction was authorized, it could no longer be said that the men who acted as directors, and had the direct legal responsibility for the management of this Company, [952] were employees or associates of American Power & Light Company, as has been suggested was true at the first meeting when this 1910 transaction was considered?

A. I believe that is so. I believe that there was a certain independence of action granted or exercised by the second management in so far as it might affect the dealings with a third party.

Q. I think that in the course perhaps of Mr. Neill's testimony attention was called to the composition of the Board of Directors of the Pacific Light & Power Company, and this particular date of December 22, 1911 happened to be picked out. On that date all but three of the fifteen Directors were men who resided in Portland, Oregon or Tacoma, Washington or Spokane, Washington or other places around in the States of Oregon and Washington, isn't that true?

(Testimony of John J. O'Neil.)

A. That is true, I believe.

Q. And that situation has prevailed ever since, has it not? That is, at least, there has always been, —there never have been more than three New York Directors on this Board of 15 Directors, have there?

A. I don't believe there have.

Q. And so far as the record shows, there probably has not been any meeting of the Board of Directors of the Pacific Light & Power Company at which those who were the three Directors of the Company from New York were present, [953] has there? A. That is a very large order.

Q. I mean you would not be surprised if I should make the statement to you that the New York Directors did not attend the meetings of the Board of Directors of the Pacific Power & Light Company except in very rare and remote instances?

A. I don't believe that would be surprising.

Q. And with respect to this Board of Directors which we identified as of that particular date as being composed of men like J. C. Ainsworth, who was for many years president of the United States National Bank of Portland; Mr. C. Hunt Lewis, who was a financial and businessman here in Portland, Oregon; Mr. H. C. Lucas, who was a banker in Yakima; Mr. Edward Cookingham, who for many years was chief officer of the Ladd and Tilton Bank, and later with the United States National Bank; Mr. Philip Beuhner, who was a tim-

(Testimony of John J. O'Neil.)

berman and a man with large financial interests, living in Portland; Miles C. Moore, who was Governor of the State of Washington at one time, or perhaps he was the last territorial Governor of the Territory of Washington, and a businessman in Walla Walla; S. S. Gordon, who was a banker and businessman at Astoria, Oregon; Mr. William Jones, who was head of the Jones-Scott Milling Company of Walla Walla and Tacoma; Josiah Richards, who was a businessman living in Spokane, whose business interests required him to travel considerably [954] in the State of Washington; and Mr. Fred S. Fogg, who was a banker and a lawyer in Tacoma.—men of that type could reasonably be looked upon as men of independent judgment and responsibility, could they not, based on my description of their activities and places in the scheme of things?

A. Well, unfortunately, I don't know any of the gentlemen that you mentioned, but I will grant this, Mr. Laing, just by general description, as the question was asked, the question would seem to draw that sort of information as to whether or not that type of man, or those types of men, would generally be considered to have independent thought, and I will definitely grant that.

Q. Well, immediately after this transaction we have a situation where not only has the legal title to these properties passed to a new corporate entity, but we have a Board of Directors directing

(Testimony of John J. O'Neil.)

the affairs of the new corporation, who are these men of substance and responsibility and who have no other relationship or connection with the American Power & Light Company, except as being Directors of this Company; we have underlying bondholders; we have Pacific Company's bondholders and Pacific Company's preferred stockholders, all having something to say about the administration of the affairs of the Pacific Power & Light Company; so it would scarcely be correct, under the circumstances, to say, after that transaction the American was the sole owner [955] of the Pacific Power & Light Company, would it?

A. Well, in so far as the common stock equity measures the degree of proprietorship, and all the other evidences of indebtedness are either secured indebtedness or mortgages, to that extent the American was sole owner, other than the fact that the properties and assets of the corporation might have been mortgaged.

Q. Well, at least the rights and interests of third parties, to a very, very pronounced degree had come in through the issuance of Pacific bonds?

A. That is very true, Mr. Laing.

Q. And the interest of third parties had come in through the issuance of preferred stock and the acquisition of the preferred stock by the public generally?

A. That is correct.

Q. Now, with reference to a statement you make in the transcript at page 884—I thought you let

(Testimony of John J. O'Neil.)

the Pacific Power & Light Company down quite a little here when you say: "Pacific Power & Light Company is but an account in the general ledger of the American Power & Light Company, the costs of which have been analyzed and established on the books of that Company. Securities have been substituted for the costs, but there has been no change in the costs. As a result." I assume because we are just a ledger entry, "certain of the subsequent adjustments result from an analysis of system costs of the [956] properties acquired."

Now, I would like to ask you if American should go out tomorrow and acquire, say, 5 percent or 10 percent of the securities of some other enterprise, that company, so far as it relates to the American Power & Light Company, would probably be only a ledger account on the books of the American Power & Light Company; would that not be true?

A. Yes.

Q. Or if the American today, not owning any of the Pacific Power & Light Company securities—not today, but two years ago or three years ago—should have gone out and bought a block of Pacific preferred stock at the then depressed market price, at thirty or forty points, whatever the price was, purchasing at this price \$100,000 par value of Pacific preferred stock; assuming those facts and having invested \$30,000 or \$40,000 for this \$100,000 par value of preferred stock; in that case, the Pacific Power & Light Company would be a

(Testimony of John J. O'Neil.)

ledger account on the books of American for whatever was paid for that preferred stock?

A. Yes. To carry the illustration a little further; the Inland Power & Light Company is but a ledger account on the books of the Pacific Power & Light Company.

Q. You don't intend to imply that we do not have separate personalities or separate corporate existences? We are nothing more than merely somebody else's bookkeeping [957] entry?

A. I am afraid you are taking me in the legal field.

Q. I am perhaps taking your statement a little bit too literally; I want to know just what you meant when you stated we are a ledger account on the books of the American Power & Light Company.

A. You will have to remember the question that I was asked as to why I went to American to get the Pacific Power & Light costs. That is why I said they were an entry on the books of the American Power & Light Company.

Q. Let us assume this kind of a situation, where the Pacific was organized entirely independently of American, and it sold all of its bonds and all of its preferred stock and all of its common stock directly for cash at the face value of the securities; in other words, its preferred stock brought into the the treasury \$100 a share in actual cash, and the Company went along for a number of years and

(Testimony of John J. O'Neil.)

ran into a depression which affected its earnings, or there was a threat of destructive competition which frightened investors, or something happened so that the preferred stock, marketwise, was worth only \$25 a share; and then suppose that the American Power & Light Company stepped into the picture for the first time as an investor in Pacific, and spent \$25,000 in buying that stock and, by so doing, would have acquired stock of a par value of \$100,000 for a \$25,000 investment [958] under that assumption, the Pacific would be an item on the ledger account of the American to the extent of \$25,000; would it not?

A. That is correct.

Q. But the cost of the property that the Pacific Power & Light got from that stock when it was issued originally would be the cost as recorded on Pacific's books that it paid for the property that it got?

A. That would be very true, Mr. Laing.

Q. So that the very fact that the Pacific is just an account on the general ledger of the American is not the thing that determines or has any bearing on your use of American costs in getting at the adjustments you reflected in this reclassification statement?

A. Let me look at it this way: The original costs or the costs of acquiring the properties were first accumulated on the books of the American Power & Light Company. Now, upon the substitution of those costs, or, rather, by the substitu-

(Testimony of John J. O'Neil.)

tion of securities of the Pacific Power & Light

Q. Of course it does not change the American the costs of the various properties lose their identity in the securities of the Pacific Power & Light Company. Now, dealing with the properties on the books of the Pacific: in order to determine the costs of those properties, you can't go to the securities of the Pacific; you must go to the account [959] on the books of the American, where those costs have been accumulated and where the substitution of costs for securities has been made.

Q. Where you say you can't take the securities as representing the cost, that is because, in your judgment, the transaction was dominated by the American Power & Light Company and they were in a sense, as you see it, acting on both sides of the bargain; is that right?

A. I probably view the situation this way: that a group of operating properties in the Pacific Northwest are acquired; they don't want to be called "American" or operated by American; or American doesn't want to operate them so American forms an agent, a child, to operate its properties in the Pacific Northwest and does it through the medium, as you characterize it, the medium of a legal entity in the Northwest to enter into any contracts or whatever may be necessary; but that does not change the costs.

Q. Of course it does not change the American costs; we recognize that. But the point of your dis-

(Testimony of John J. O'Neil.)

cussion here,—and I don't wish to drag it out unduly—as I see it is this: the reason that you feel that the American costs are controlling in determining the costs to Pacific in the 1910 transaction is because at that time, to all practical intent and purposes, as you see it, the American Power & [960] Light Company dominated and really was the Pacific, under another name for the moment?

A. That conclusion is predicated upon the fact that the properties costing the American Power & Light Company six million dollars did not become costs of \$10,900,000 by the formation of a new legal entity.

Q. Merely by the transfer of the property to a company controlled by the American Company?

A. That is correct.

Q. But the mere fact that a company such as the Pacific, or any other corporation, was an account on the ledger of the American Power & Light Company would not have any particular significance, would it, Mr. O'Neil?

A. Other than the fact that that is where I go for my costs.

Q. In the case I cited, where the American may have bought \$100,000 value of preferred stock for \$25,000, making its first investment at that time in the Pacific, would that have any bearing on the cost to the Pacific of the property which represented that stock?

A. No.

(Testimony of John J. O'Neil.)

Q. So the whole thing boils down in your mind to the fact that the American in 1910 was momentarily the owner of all the securities which the Pacific issued and exchanged for the properties which American turned over to Pacific at [961] that time; isn't that true?

A. That is essentially correct, yes.

Q. Now, at a later place in your testimony, where you talk about the 1930 transaction,—

A. Interposing) Is that in connection with the \$623,000?

Q. I will find it. You used the expression: "Without attempting to repeat again the opinions expressed in this testimony, it will suffice to say that the transaction in 1930 was similar to the 1910 transfer, entirely between the same owners."

Now, in the line of our discussion, would you say that Pacific Power & Light Company and the American Power & Light Company were one and the same corporate entity in 1930?

A. No; they were not one and the same entity, Mr. Laing, but they were under common control.

Q. What are you referring to by "common control"?

A. Are you referring to the Inland and Pacific, or the American and Pacific?

Q. The American and Pacific.

A. In 1930 the relationship of American to Pacific was one covered by the definition of "control".

Q. We are not discussing the question of "control" as exercised at a stockholders meeting; the

(Testimony of John J. O'Neil.)

expression in your testimony was that the transaction was entirely between [962] the same owners. I just wanted to know what you meant by that.

A. Well, a more general interpretation of that would be that the various prices placed upon the properties in the transfer were all a matter of common control. I am not saying there was no independence of thought, or that there were not two separate parties arriving at the prices at which those were to be transferred.

Q. On what do you base your statement?

A. Well, I believe, the American owned all the common stock of Pacific.

Q. That is true.

A. That is right, and all the common stock of Inland.

Q. Yes. But we are talking about the transaction that took place between the Pacific and American, where the Pacific acquired certain properties from the American and gave the American certain securities in place of them. Do you mean to suggest that that was not a transaction between separate parties, negotiated between separate parties?

A. You are not putting in the question the legal corporate entities?

Q. I am trying to get at what you mean when you say that transaction of 1930 was between the same owners. I assume you mean by that that they were identical. [963]

A. That there was control.

(Testimony of John J. O'Neil.)

Q. Do you mean that the American had a voting control over the election of the Directors of the Pacific; is that what you mean?

A. No, that is not all I mean, that they had control over the election of the Directors; I mean that at that time they controlled the policies and management of the Pacific Power & Light Company, which management was arriving at the price to be paid to American.

Q. Let us come back to that, because that is something I never knew before. You say that in 1930 the American controlled the management of the Pacific Power & Light Company?

A. Yes, sir.

Q. On what basis and in what manner?

A. Through the election of its Directors is one.

Q. Well, the American had, as you say, a majority control in the election of Directors?

A. Yes.

Q. Are you implying by that that the Directors did not exercise definitely independent judgment, in any discussions between the Company and the American?

A. The judgment of the Directors of the Pacific Power & Light Company might have been independent, but they would only remain so in so far as that judgment was in accord [964] with the wishes of the American Power & Light Company. By that I mean this, Mr. Laing,—

Q. You mean that they could have fired the Board of Directors at the next annual meeting?

(Testimony of John J. O'Neil.)

A. That the Pacific Power & Light Company dealing with the American were not two different people in establishing the cost or price to be paid for something. As you say, there might have been a certain degree of independence exercised by the management out here, and to that extent I will grant this: that if American wanted the Pacific to buy a certain piece of property at a certain price, that the Board of Directors out here might say, "We won't buy it at that price. We will buy it at another price." To that extent it represents an independent judgment; but it is my conclusion that, ultimately, the transaction, no matter how effected, would meet with the approval of the American Power & Light Company.

Q. Of course you would never have a deal unless two parties agree?

A. There is where we have a difference of opinion. Where there are two independent parties not commonly controlled, you have two parties in a deal, if they arrive at one. But when the Pacific Power & Light Company sold to the American, or American sold to the Pacific, that was not a deal between two independent parties. [965]

Q. But the point that you make is that if the Pacific Power & Light Company or the American Power & Light Company ever got together on any transaction, it would be an indication that the American was satisfied; is that correct?

A. Would you mind repeating that?

Q. I said the mere fact that the American and

(Testimony of John J. O'Neil.)

Pacific got together on any transaction suggests to you that the American was satisfied, and therefore it carried out its control. As a practical matter, is that a fair statement to make?

A. Oh, I believe so.

Q. Supposing you and I would talk about a deal, and I said I have got a piece of property that I am willing to sell for a thousand dollars, and we dicker for a while, and you say "I will give you \$800." Well, we consummate the deal. Does that indicate that you control the transaction?

A. Between you and me?

Q. Yes. A. I would say No.

Q. And the only reason you differentiate that kind of transaction from the sort of transaction that might have occurred between the American and the Pacific is your assumption that because the American had the power to ultimately get rid [966] of the Board of Directors, there wouldn't be any independent bargaining between them on any transaction; isn't that it?

A. Well, let me put it this way, Mr. Laing: I will grant that there might be differences of opinion, that the views of American might be different from the views of Pacific, and the Directors here might argue or debate that, for certain local reasons, certain things that the American wanted to do would not be satisfactory to them, and vice versa; to that extent, there might be differences. But the point I want to make is that, as a result of independent action, if you want to characterize it

(Testimony of John J. O'Neil.)

as such, on the part of the local management, if an exchange or transfer of property was not made at cost, just because there might have been, in your opinion, an independent judgment exercised in the transfer of those properties would not influence the fact that it was a profit so far as the other company was concerned. Do I make myself clear?

Q. Yes.

A. You might not give the American the full amount the American asked, and to that extent exercise an independent judgment; but if that figure is still higher than the cost, it still represents profit to the seller.

Q. But the particular reference we had, in the transaction we had in mind, was where it was less than cost.

A. I believe that in that particular transaction [967] there was a little bit of what you said.

Q. Some real bargaining?

A. That is correct. I might add to that, Mr. Laing, in spite of the fact that there was that independence of action which was characteristic of that particular action, I have still transferred that as a debit to Account 107.

Q. I understand that. The point I am making is that, except for the transaction that occurred in July of 1910, we have had a Board of Directors that, in no sense of the term, could be said to be American nominees or associates, in the sense

(Testimony of John J. O'Neil.)

that you refer to them in connection with the transaction of July, 1910. We have had an independent Board of Directors, made up of Western men, who have been responsible for the operation and administration of this property for the last thirty odd years, beginning within two or three weeks after this transaction in July, 1910, have we not?

A. I don't want to profess a familiarity with all of the actions of the Board of Directors since 1910, but I would at least go this far with you and say that, since 1910, there have been no similar transactions of the kind that took place in 1910; and if, to that extent, it would indicate an independence on the part of your local Board of Directors, that is all I know, that such a thing—I don't like to use the word “perpetrated”—that such a deal [968] should not be perpetrated.

Q. I don't intend to argue the matter with you. I merely wanted to bring out what I know to be the fact.

A. I believe your ideas are just the same as Mr. Slaflf's; you are just trying to get my ideas on the record.

Q. With respect to the 1910 transaction, your point is that, inasmuch as American owned all the securities at the time all the properties were turned over to the Pacific, and at the meeting at which this transaction was authorized and consummated, you might say the members of the Board at that time were men largely connected with the Ameri-

(Testimony of John J. O'Neil.)

can Company and its associates in New York—for that reason you don't feel that the judgment exercised by those men, as Directors of the Pacific Power & Light Company, should be given any weight in determining the cost to the Pacific Company, but, instead, we must rely exclusively on the costs as recorded on the books of the American Company?

A. Irrespective of independent judgment or the controlling judgment, in transfers between associated companies those transfers should not be made at a profit, or effect any writeup in the plant which is offset by securities. Does that answer your question?

Q. You are expressing your point of view? The last answer expresses your opinion?

A. That is right, that the transfer between [969] associated companies shall be at cost.

By Mr. Foley:

Q. You mean under the System of Accounts as you interpret them?

A. You mean the Federal Power Commission's System of Accounts?

Q. Yes.

A. Mr. Foley, I had that same idea long before the Federal Power Commission System of Accounts was promulgated. I believe it is general practice in the accounting profession, so far as I have known it, that, as between associated companies, there shall not be any profit.

(Testimony of John J. O'Neil.)

By Mr. Laing:

Q. I have only one other question, and that one has to do with the treatment you and your associates have received from the Pacific Power & Light Company organization in the prosecution of your studies or in checking work or investigation relating to this Pacific Power & Light reclassification.

As I recall, you stated you had been on this job from about the first of July, 1940 until some time around the first of October, 1940 working here in Portland, and that afterwards your relation to the job was in a supervisory capacity, and that Mr. Flynn was then directly in charge of the work here in Portland; and I assume, like Mr. Flynn, [970] you came here some days in advance of the hearing, September 29, to check up on the work that had been done by the Company in presenting its revised statement; so that you have had, over that period of time, from the first of July, 1940 to the present time, a considerable amount of direct and indirect contact with Mr. Neill, Mr. Phipps and Mr. Hawkins, and others of the Pacific Power & Light Company who had responsibilities in connection with the reclassification work; and what I want to know from you is what sort of treatment you found you got from these men in so far as it pertained to the carrying on of the work that you were trying to do.

A. Unfortunately I had little or nothing to do with Mr. Hawkins, but I would include him, in

(Testimony of John J. O'Neil.)

view of my experiences of the last few days. Most of my contacts were with Mr. Neill, Mr. Willard and Mr. Phipps; and the conclusion that I would draw from my association with those men is that, so far as my particular examination was concerned, I found that they were not only cooperative but, by comparison with certain other general experiences a long time ago, I found them extremely helpful and cooperative in attempting to assist, even beyond what we might ordinarily have required.

Q. So then, speaking generally, do you consider that the Company has attempted in good faith and with reasonable diligence to comply with the requirements that were made upon it by the System of Accounts and the orders [971] we have to respond to in this proceeding?

A. I would say Yes.

Mr. Laing: That is all, Mr. O'Neil.

Trial Examiner: Do you have any questions, Mr. Foley?

Mr. Foley: No questions.

Trial Examiner: Any questions, Mr. Slaff?

Mr. Slaff: There might be a few questions of the witness, but I would prefer to look at the transcript and I can then determine whether there is any necessity for further examination.

Trial Examiner: You may step down, Mr. O'Neil. [972]

MELWOOD W. VAN SCOYOC

called as a witness on behalf of the Commission, having been previously sworn, resumed the stand and testified further as follows: [975]

Direct Examination

(Resumed)

By Mr. Slaff:

Q. Mr. Van Scoyoc, you have previously testified in this proceeding, have you?

A. Yes. At the hearing held in Washington, D. C. on May 24, 1940.

Q. At the time of that hearing, the field examination of the original cost study of Pacific Power & Light Company had been suspended?

A. Yes, sir.

Q. Was the field investigation subsequently reopened?

A. Yes. On July 8, 1940, after Pacific Power & Light Company submitted its original cost study to the Commission the investigation was resumed.

Q. When was that field examination concluded?

A. On February 15, 1941.

Q. Did the staff assigned to the field investigation prepare a report covering the investigation?

A. Yes. A report was prepared in collaboration with the staff of the Public Utilities Commissioner of Oregon; it is Exhibit No. 16 in this proceeding.

Q. And did you concur in the conclusions and recommendations set forth in the report?

A. I did.

(Testimony of Melwood W. Van Scoyoc.)

Q. And you examined the original cost study prepared [976] by the Pacific Power & Light Company, the first one, being Exhibit 15 herein?

A. I have.

Q. And have you also examined the revised statement submitted by Pacific Power & Light Company, the Exhibit No. 15? A. Yes, I have.

Q. You have been present, of course, and heard the testimony of Mr.——

Mr. Laing (interposing): Mr. Slaff.

Mr. Slaff: Surely, Mr. Laing.

Mr. Laing: Did you give that last one the right number?

Mr. Slaff: 17; that is what I thought I said.

The Reporter: Mr. Slaff, you said "Exhibit 15".

Mr. Slaff: That last one should be Exhibit No. 17. Thank you, Mr. Reporter.

By Mr. Slaff:

Q. And you have been present here and heard the testimony of Mr. Will T. Neill in this hearing? A. Yes, I heard Mr. Neill testify.

Q. Is it your understanding from Mr. Neill's testimony on the Revised Statement, Exhibit No. 17, that the Company is in agreement with the Commission's staff with respect to the adjustments set out in Exhibit No. 16, [977] relating to Account 100.1, Electric Plant in Service, and Account 100.2, Electric Plant Leased to Others?

A. Yes, sir.

Q. Have you heard the testimony of Messrs.

(Testimony of Melwood W. Van Scoyoc.)

J. H. Flynn and John J. O'Neil of the Commission's staff in this proceeding? A. I have.

Q. And are there any comments you would like to make with respect to their testimony?

A. Nothing, except to say that I am in agreement with the views and conclusions expressed by them.

Q. Mr. Van Scoyoc, as a result of certain further adjustments to the Company's revised reclassification statements, Exhibit No. 17, which were testified to by Mr. O'Neil and reflected in his Exhibits Nos. 43 and 47, there is classified in Account 107, Electric Plant Adjustments, the sum of \$6,420,800.61. Have you given consideration to the appropriate disposition of such amount?

A. Yes, I have. [978]

Q. After making the dispositions which you have been discussing, what remaining balance is there in Account 107, Electric Plant Adjustments?

A. \$4,122,173.16.

Q. What does this amount represent?

A. It represents the excess of recorded costs on Pacific Company's books over the cost to American Power & Light Company of certain properties transferred to the Pacific Company in 1910 and 1930, amounting to \$4,121,981.41, and a small amount of \$191.75 applicable to the Walla Walla Valley Railway Company.

Q. Why is this amount of \$4,121,981.41 classified in Account 107, Electric Plant Adjustments?

[981]

(Testimony of Melwood W. Van Scoyoc.)

A. This item is classified in Account 107 as it is the opinion of the staff that it is a writeup of plant, and under the System of Accounts must be included in Account 107.

Q. Have you any recommendations to make with respect to the disposition of the amount of \$4,122,-173.16 which has been classified in Account 107?

Mr. Foley: Mr. Examiner, I would like to object to this question upon the ground that any testimony elicited would be irrelevant and immaterial and premature, because it calls for evidence of the witness as to the disposition of amounts proposed to be placed in Account 107 by the staff before the Commission has determined what definite items and amounts should be placed in such account, which is to require the meeting of the issue of disposition of amounts classified in Account 107 before the Commission has determined what items and amounts should be so classified. We submit it violates the constitutional guarantees of procedure by due process.

Trial Examiner: The order setting this matter for hearing made provision that the evidence should be taken as to the proposed disposition of any items that might be in controversy between the staff and the intervener. The objection is therefore overruled.

Mr. Laing: I would like to have the record show I join in Mr. Foley's objection, and I would like to object [982] on the further ground that the matter of disposition of items which may ulti-

(Testimony of Melwood W. Van Scoyoc.)

mately get into account 107 is not an accounting matter. It is not a matter on which an accountant as such is qualified to express an opinion, and it is a matter, as Mr. Smith himself has said on many occasions, which calls for the judgment of the Commission upon all the facts as elicited; and it is, therefore, not one that is a proper subject of testimony by this witness.

Trial Examiner: Overruled.

Mr. Slaff: Will you proceed?

Mr. Foley: I suppose we have the same objection to this entire line of testimony.

Mr. Slaff: You make a general objection, I take it, running to each question?

Mr. Foley: Yes, I wish the objection to the entire line of question be noted.

Trial Examiner: Yes, it may be so understood, Mr. Foley.

A. (Continuing) Yes. I believe that it should be disposed of from Account 107 at once.

By Mr. Slaff:

Q. Why do you recommend disposition?

A. The amount represents inflation of the accounts. It is not a valid cost and has no proper place in the accounts of a public utility. [983]

Q. What plan do you recommend be followed with respect to disposing of this item?

A. As far as accounting principles are concerned, the amount should be eliminated at once. It could be charged either directly to Earned Surplus or to a created Capital Surplus. If this

(Testimony of Melwood W. Van Scoyoc.)

amount is charged to Earned Surplus at once, it would cause a large deficit therein. As a matter of policy, and not as a matter of accounting principle, some amortization program might be sanctioned, such as was ordered by the Federal Power Commission in the case of Northwestern Electric Company in the Opinion dated December 6, 1940, Opinion No. 56, Docket IT-5642. When I refer in this instance to matter of policy, I refer particularly to consideration which might be given the position of the preferred stockholders.

Q. Have you given any consideration to a plan for the creation of capital surplus which could be used to extinguish this write-up?

A. I have.

Q. Will you explain what you have in mind?

A. I should like to suggest this plan for consideration by the Commission, as well as by Pacific Power & Light Company and American Power & Light Company which I feel offers an excellent solution of the problem.

As of December 31, 1940, American Power & Light Company [984] held 1,000,000 shares of the no par value common stock of Pacific Power & Light Company, having a stated value per share of \$7.00 or a total for the 1,000,000 shares of \$7,000,000. It also owned a 6 percent note of Pacific Company in the principal amount of \$2,794,500.

It would be my suggestion that American Company forgive or make a capital contribution of

(Testimony of Melwood W. Van Scoyoc.)

such indebtedness which would create a capital surplus in the above stated amount. I would also suggest that American Company surrender 189,667 shares of Pacific Company's common stock now held by it, which at \$7.00 per share will result in a further capital contribution of \$1,327,669. The sum of \$2,794,500 and \$1,327,669 is \$4,122,169, and such amount could be used to extinguish the write-up classified in Account 107. The balance of Account 107 amounting to 4.16, could be charged to Earned Surplus.

Q. If such a plan were followed, what would be the resulting capital structure of Pacific Power & Light Company at December 31, 1940?

A. The Company would then have outstanding: Common stock, 810,333 shares, \$5,672,331; preferred stock, 68,685 shares, 6,868,500; 1st mortgage bonds, \$20,500,000, a total of \$33,040,831.

Q. What would be the effect on the income of Pacific Company of your suggested plan? [985]

A. On the basis of 1940 operations, the income account would be relieved of a charge for interest on the \$2,794,500 of notes to American in the amount of \$167,670.

Q. And would this amount then be available for common stock dividends to American Power & Light Company?

A. It would be available for such dividends or other charges.

Q. In your judgment, Mr. Van Scoyoc, would the consummation of such a plan as you have sug-

(Testimony of Melwood W. Van Scoyoc.)

gested effect an improvement in the financial situation with respect to Pacific Power & Light Company?

A. Very much so. It removes a write-up from the asset side of the balance sheet. It also has the effect of materially improving the company's current position; bettering its times interest earned ratio, its times dividends earned ratio applicable to the preferred stock, and also the amount earned per share for the common stock.

Q. Would the stated value of the company's common stock then measure the actual cash investment of American Power & Light Company in such common stock? A. Yes, it would.

Q. Does this complete your discussion with respect to the disposition of the write-up?

A. Yes, it does. [986]

Q. What amount is classified in Account 100.5, Electric Plant Acquisition Adjustments?

A. Exhibit 46 reflects an amount of \$2,741,591.66 classified in that account.

Q. And what does that amount represent?

A. It represents the difference between the original cost of acquired property at December 31, 1936 and the acquisition cost thereof.

Q. Does it represent amounts paid for operating units or systems over and above the original cost of such operating units or systems acquired?

A. Yes, it does.

Q. Have you made any studies which indicate

(Testimony of Melwood W. Van Scoyoc.)

what these payments in excess of original cost were for? A. Yes, sir.

Q. And what conclusions did you arrive at as a result of such studies?

A. It was my conclusion that substantially all of [990] the excess above original cost represents payments for intangibles.

Q. Upon what did you base your conclusion?

A. With the exception of the properties acquired from Inland Power & Light Company in 1930, appraisals are available at or about the dates of acquisition of practically all properties which, upon examination, indicated that the replacement cost of the physical units of property plus the market value of land and less the accrued depreciation, was not greater than the original cost of the property; hence it must be concluded that the amounts paid in excess of original cost were for intangibles. With respect to the Inland properties, appraisals made in anticipation of sale by Puget Sound Power & Light Company, to Inland of the leased properties showed total appraisal values of physical property of less than the estimated original cost of the properties. Some portion of the acquisition adjustments arising from the purchase by American and Inland of the properties of the Bend Water, Light & Power Company, Deschutes Power Company, Sherman Electric Company and Enterprise Electric Company, which were transferred by Inland to Pacific in 1930, may have been applicable to physical property. However, there were no appraisals made in anticipation of

(Testimony of Melwood W. Van Scoyoc.)

such purchases, or immediately thereafter, and it appears from the [991] Company's correspondence files that actual and anticipated earnings were the major consideration in purchasing these properties.

In making use of the various reproduction cost appraisals for the purpose of arriving at a conclusion with respect to the presence of physical property values in excess of original cost, I do not mean to imply that the value of physical property is always equal to the reproduction cost new thereof less accrued depreciation. Cases will, of course, exist where such values may well be less than the values determined on a reproduction cost basis. I merely wish to point out that it represents a ceiling for physical property values.

Q. Have you attempted to allocate any of the acquisition adjustment to physical property values?

A. It would be impossible at this date to make anything but a very rough approximation of the amount of acquisition adjustment applicable to these properties which may be assignable to physical property values. I have not attempted to do so, for I do not believe that such a study would serve any useful purpose.

Q. Is it your judgment, then, Mr. Van Scoyoc, that the entire balance in Account 100.5 of \$2,741,-591.66 should be considered as payment for intangibles?

A. Yes; I believe for all practical purposes that [992] the balance in Account 100.5 should be so considered. In that connection I desire to point

(Testimony of Melwood W. Van Scoyoc.)

out that it was the practice of the Company to make retirements from time to time of certain properties on the basis of the Hagenah reproduction cost new appraisal. The credit item in Account 100.5 labeled "Rretirement Adjustments" and shown on Exhibit No. 46 is the result of this practice. These retirements which were made in excess of original cost have the effect of decreasing that portion of the acquisition adjustment which may be applicable to physical property.

Q. Have you attempted to identify or classify the several kinds of intangibles which may be present in the acquisition adjustment account?

A. No. On the basis of available information such a determination would involve a great deal of speculation. As Mr. Neill stated in his testimony on last Monday, intangible values tend to merge. Furthermore, practically all intangible values can be associated with earning power in one way or another.

Q. Do you believe that intangibles bought and paid for have a permanent place in the plant accounts of a public utility?

A. No, sir; I do not. Intangibles have a very questionable value, as well as life. There is no more reason to retain permanently the cost of an intangible in the books [993] of account than there is to retain the cost of tangible property in the accounts after it has been physically retired. The difficulty lies in the fact that the life of an intangible

(Testimony of Melwood W. Van Scoyoc.)

is uncertain and its decline in value is not as easily ascertainable as that of tangible property. The sane and prudent thing for management to do is to provide for its ultimate loss in value. It is good accounting and it is practiced to a large extent by non-utility business enterprises. I might add that it is beginning to be practiced by a good many public utilities with which we have come in contact in our reclassification work.

Q. Do you have any specific recommendation with respect to the disposition of the amount in the acquisition adjustment account of \$2,741,591.66?

Mr. Foley: I would like to object to the question and other similar questions to follow on the same grounds I objected before.

Mr. Laing: And I would like to renew my previous objection.

Trial Examiner: Objection overruled.

A. (Continuing) Yes. My recommendation would be that this amount be disposed of from Account 100.5 by equal annual charges to Account 537, over a period of 10 or 15 years commencing with the year 1941. [994]

By Mr. Slaff:

Q. What, for purposes of illustration, would be the annual amount to be amortized on a 15-year basis? A. \$182,772.77.

Q. Why do you recommend a 10 or 15-year amortization period?

A. While I believe a shorter period would be more desirable in view of the fact that approxi-

(Testimony of Melwood W. Van Scoyoc.)

mately one-half of the acquisition adjustment has been carried on the books of the Company for 30 years, in matters of this kind a practical solution is sought and, in my judgment, an amortization program of 10 or 15 years will satisfactorily accomplish the disposition of the acquisition adjustment.

Q. What effect would a 15-year amortization program have on the net income of the Company?

A. On the basis of 1940 operations, and taking into consideration my previous recommendations with respect to the disposition of amounts in Account 107, Electric Plant Adjustments, the net income of the Company for 1940 available for preferred and common stock dividends would have been \$775,421.43, as compared with \$853,579.31.

Q. After payment of preferred dividends, how much would be available for common dividends?

A. \$316,943.43.

Q. Does this plan of disposition for the amount in [995] Account 100.5 affect the Company's cash position, or in other words, does it involve the expenditure of any funds?

A. No, sir, it simply means that the acquisition adjustment is replaced over a 15-year period through charges to income with other assets—either cash and other current assets, or physical property.

Mr. Slaff: You may cross examine. [996]

Cross Examination

By Mr. Laing:

Q. With respect to several of these items which

(Testimony of Melwood W. Van Scoyoc.)

were discussed in your testimony as amounts which in your judgment should be transferred to certain other accounts, notably, the \$42,000-odd that the Company and the examiners seem to have agreed upon should go to Account 107 and thence to surplus, as a charge against it, and the amount of amortized debt discount and expense of which \$454,349.90 represents an amount which relates to bonds that became due on August 1, 1930, and which therefore are theoretically washed out, and the remainder, \$1,576,377.74 representing discount and expense incurred in connection with the bonds that were issued August 1, 1930 running for a period of 25 years—you stated rather emphatically that the parts of these amounts in the Debt Discount and Expense, which represent the matured part of it at the present time, should be immediately charged to surplus; and you go on to say it is presumed of course that the Company will include in its income account for 1941 and subsequent years the proportionate share of the un-amortized debt discount and expense applicable for such years.

Now, do I understand from your language with respect to those items that the Company may properly go ahead and make these transfers at the present time, or is the Company [997] supposed to wait for some action or ruling with respect thereto?

A. I may say this, Mr. Laing, that with respect to the disposition made of Account 107 items, this, I believe under the language of the System of Ac-

(Testimony of Melwood W. Van Scoyoc.)

counts, should be made under the Commission's direction or approval.

Q. With respect to this discount and expense, as I recall the examiner's report, they have handled that through Account 107 as a clearing account, have they not? A. Yes, sir.

Q. And they rather objected to the Company's proposing directly to put it in as a charge to surplus, the part that has already gone by.

Now, what is the procedure that you recommend?

A. My recommendation is, first of all, that the amounts should go to 107, and then be disposed of from 107. I have made recommendations as to that. Now, I presume, in view of the fact that we are in a formal proceeding now, that that matter will be covered whenever the Commission enters its order. If, however, the Company should want immediate action on it, I see no reason why it should not petition the Commission for authority to dispose of those amounts immediately.

Q. As we understand the amenities of the situation at least, we are not supposed to do anything about it until [998] we get some approval or order from the Commission? A. That is right.

Q. And the same would be true about these transfers of capital stock discount and expense that are proposed to be transferred out of plant into Account 151 and 150? A. Yes, sir. [999]

Q. If I understand your procedure, Mr. Van Scoyoc, [1001] in approaching the problem of the disposition of this amount, that you classify in Ac-

(Testimony of Melwood W. Van Scoyoc.)

count 107 as representing the excess cost to Pacific over cost to American, you have given no consideration whatever in your treatment of the matter to what values there may be in the Company's plant at the present time that would be an offsetting element against this \$4,122,173.16?

A. I have not arrived at any relationship between the cost of the physical property and such intangibles as were purchased and present fair value of the Company's property as may be measured through some way of measuring value.

Q. You have considered that the problem is one of purely cost accounting and not one of determination of value, have you not?

A. Yes. I don't think there is any relationship between the cost as recorded on the books of account and the present fair value of the property as might be measured—as Mr. Willard has measured it—by reproduction cost new.

Q. Do you recall, Mr. Van Scoyoc, Mr. Charles W. Smith's testimony in the Northwestern reclassification case?

A. Well, I don't know that I recall the particular part that you have in mind, but I do recall it generally.

Q. I mean in a general way. I am going to read an extract, a small extract of that testimony, and ask if you would subscribe to the views that he expressed there at that [1002] time.

Mr. Slaff: What is the page reference?

Mr. Laing: I am taking it out of the Circuit

(Testimony of Melwood W. Van Scoyoc.)

Court of Appeals, record 490 of the transcript, and probably it laps over on 491:

“The new system of accounts, pursuant to its main theme of requiring a reclassification of plant accounts, provides that write-ups shall be reclassified and included in Account 107. Account 107 will bring the amount of direct inflation to the attention of the Commission. It is the accountant’s duty to bring out the facts. It is the Commission’s duty to see that proper disposition of the write-ups is made after obtaining the facts. The accounting system itself does not provide for the disposition of inflation—it merely provides, to reiterate, for the ear-marking of the accounts thereof.”

I have read enough to give you the background of Mr. Smith’s statement, and what I want particularly to direct your attention to his statement that the accounting system itself does not provide for the disposition of inflation as Mr. Smith had defined it.

A. Yes, I agree with that. I might explain just a little further on that particular point too, that the language of the text of Account 100.5 says that this may be disposed of as the Commission may [1003] approve or direct. Account 107 says this shall be disposed of as the Commission shall approve or direct. There is nothing in the system that says you shall dispose of it this way or another way, but that is left to the discretion of the Commission after hearing all the facts in the matter.

[1004]

(Testimony of Melwood W. Van Scoyoc.)

Q. In other words, the purpose of the system is to endeavor to present the proper data in their proper pigeon-holes, if we may use that expression, so that the Commission, as a matter of policy, may decide after a full review of all the facts and circumstances what properly should be done?

A. That is one of the purposes of the system, of course, to provide information upon which the Commission may act.

Q. So that the disposition of items that get into Account 107 is primarily not an accounting function, is it?

A. The disposition is not an accounting function?

Q. Yes.

A. Do you mean as to accountants disposing of these items?

Q. I mean it is not a function of the accountants, as discussed by Mr. Smith in his presentation in the Northwestern case—it is a matter of the accountants function to present the facts; the question of what should be done upon those facts is a matter for someone else to decide, is it not?

A. Well, the decision rests with the Commission or the management, with respect to the duties of accountants with respect to recording entries, and that sort of thing.

Q. And the determination of what weight shall be given to all the relevant facts and circumstances is a matter [1005] for the Commission to determine as a semi-judicial matter, is it not?

A. Well, as to what consideration shall be given

(Testimony of Melwood W. Van Scoyoc.)

to the testimony, surely, they are acting in that capacity.

Q. And as to what facts and criteria are relevant in that determination, that also is for the Commission to determine, is it not, in the first instance at least?

A. I don't know that I quite get the import of your question, Mr. Laing.

Q. What I am asking you, Mr. Van Scoyoc, is to attempt to delimit the functions of the accountant as distinguished from the problem that is before the Commission when it has to pass upon such questions as the disposition of the amounts in these accounts?

A. Well, as far as my function is concerned, and I think generally the function of accountants on the staff of the regulatory bodies is to make recommendations to the Commission and to acquaint the Commission with their views on these things.

Q. Well, isn't it the accountant's function primarily to determine the cost and other data pertaining to the appearance in the accounts of various items of property and expenses?

A. I would not say that they were limited to determination of costs. [1006]

Q. Well, one thing we are apparently agreed on, and that is it doesn't include any determination of values of property, does it? I mean that is not an accountant's function, is it?

A. Well, they may have to express opinions on

(Testimony of Melwood W. Van Scoyoc.)

values, based on various criteria which are used in that determination.

Q. Well, do you consider that an accountant, as such, and in his capacity as accountant, is either qualified or competent to express an opinion on value, except as might be measured by original cost or some other kind of cost?

A. Well, I would not limit it to the original cost. I would say this to you: that I don't think an accountant is competent to express an opinion as to the reproduction cost of physical property; I will agree with you upon that; but there are other criteria of value, such as capitalization of earning power on which accountant is well qualified to express an opinion.

Q. He certainly could make a computation as to what so many times the net earnings would be; I appreciate that.

A. Surely.

Q. But in so far as it has to do with the determination of some of the elements which conceivably the Commission might consider to be relevant to a determination of what should be done with the balances that are ultimately placed in Accounts 100.5 and 107, the accountant's function does not [1007] comprehend the whole range of data and considerations that the Commission may take into account, does it?

A. In determining values?

Q. Yes.

A. No, sir. [1008]

Q. Now, in your discussion of the amount that you propose to classify to Account 100.5, you are

(Testimony of Melwood W. Van Scoyoc.)

dealing there with items that you recognize as legitimate investments in the property, are you not?

A. I am dealing there with items which were bonafide [1019] payments in arms-length transactions above original cost.

Q. Well then, you would not disagree with my statement that you recognize them as amounts that are legitimately invested in the business?

A. That is right, yes.

Q. And you had the same difficulty that Mr. Neill had in trying to tag the various aspects by particular amounts that made up the—whatever that intangible or whatever those values were, did you not?

A. Yes, that is a very difficult problem. You can draw certain general conclusions from available data; but there may be some variation as between payment for physical property and payment for tangibles, because in some of these cases, at least, we have no knowledge of what was in the minds of the man who was making the purchase; for some of them, we do.

Q. You make the statement in that connection that there was no more reason to retain permanently the cost of an intangible on the books of account than there is to retain the cost of tangible property in the accounts after it has been physically retired. The "it", of course, referring to the physical property, I assume? A. Yes.

Q. Doesn't that statement presuppose that the value, or the intangible, if you call it that, that

(Testimony of Melwood W. Van Scoyoc.)

was legitimately invested in the property, or in the business, becomes a minus [1020] or a disappearing item about as rapidly as the physical property. Now, is that a fair assumption to make?

A. No, I don't believe it is, Mr. Laing. You can buy physical property, and its life, take in the case of land, might be indefinite, perpetual life; and in other property varying all the way from one year to one hundred years, and when that property disappears, you know about it, that is as the physical structures disappear. While, with intangible, the life is so uncertain that it is a matter of speculation to start with as to what the life is, and in many cases, you might have a physical property with a long life associated with a short life intangible, or you may have just the reverse situation. I do not think there is any relationship in buying a going concern consisting of physical properties and intangibles between the life of the physical property and the life of the intangibles.

Q. Well then, you didn't mean to imply that because physical property has a measurable life, perhaps and, of course, should be retired on the basis of that, that there is any reasonably comparable measuring stick for determining the life of the intangible item?

A. No, that was not the purport of my testimony there.

Q. I just wanted to clear what you meant.

A. What I wanted to illustrate was this: that

(Testimony of Melwood W. Van Scoyoc.)

with respect to intangibles, the life is so uncertain, and if you [1021] go on pre-supposing that those things last forever, you are liable to wake up some morning and find them gone suddenly, and you have never made any provision for them. Now, that has happened time and time again in business enterprises. People have thought they had a lot of good will, and the first thing they knew, they didn't have any good will. Take the capitalization of franchise values with respect to street railways; twenty years ago, why, somebody would have paid a lot of money for a good street railway franchise. You probably could not give one away today. They had large intangible values at that time, and unless provision is made to take care of a possible loss, or maybe a fairly certain loss, particularly if it is based on earning power and above what might be called normal on the physical property you are taking a big risk.

Q. Well, isn't there a big risk also involved, Mr. Van Scoyoc, in the assumption that the physical units will have a normal life range in actual operation?

A. Surely, and to take care of most of that risk, at least, except possible loss for casualties, you are accruing depreciation annually to take care of that.

Q. But your normal calculation of depreciation accrual does not usually allow for a very substantial factor of obsolescence or change of style or change of economic conditions, does it? [1022]

(Testimony of Melwood W. Van Scoyoc.)

A. Well, it allows for obsolescence. I don't know that there is—I haven't run into any allowances for changes in economic conditions, unless you might be construing it as changes in art or something of that sort.

Q. What I mean by that is, if you are sitting down today to figure out the depreciation on a piece of steam generating equipment, you would probably calculate that in the normal range that unit would have a life expectancy, or useful expectancy, of, we will say, 35 or 40 years, and you would make your depreciation and accrual calculation on that basis, would you not?

A. Yes, sir.

Q. You would not take into account the possibility that some new form of deriving energy from the sun or some other place would put that piece of equipment out of business in a much shorter time, would you?

A. No. I would take into consideration all the factors that I could visualize which entered into that particular situation. I don't think I would take into consideration the question of the sun replacing the present type of generation; although there have been some developments along that line. But I will illustrate that point a little further: In your depreciation accrual, which is for the Washington Department \$140,000 a year, I believe there is a \$26,000 item in there to take care of the probable [1023] obsolescence, due to the fact that you are going to be able to buy power from Bonneville.

(Testimony of Melwood W. Van Scoyoc.)

Q. In that particular case that was provided for, is that correct?

A. Yes, to take care of those things that you can forecast.

Q. Yes, where you know they are coming?

A. Yes.

Q. But can you visualize with respect to the legitimate items of investments that have been made, such as we speak of here, in Account 100.5, is it your point that you should proceed on the theory that that is all going to go, anyway sometimes, and therefore you ought to get rid of it as you go along?

A. I think that is a sound thing to do, as far as intangibles are concerned, to get rid of them as fast as you can.

Q. But isn't it quite obvious, with respect to—well, we will take a hypothetical case for a moment: Isn't it quite obvious that whereas there might be a million dollars of what you might call intangibles in your definition included in the property accounts as of 1910 and 1915, that by 15 or 20 years from that time the value of the physical property and equipment, and the cost that anybody would have to pay if they bought it at that time as it was [1024] then valued, might balance, to a very large extent, the amount that on your theory was originally intangible? A. Well,—

Q. (Interposing) And it ceases to be as intangible an item as you thought of it originally, doesn't it?

(Testimony of Melwood W. Van Scoyoc.)

A. Well, as far as the cost of the property to the then owners, it certainly was an intangible, regardless of what somebody else might pay years later when the property was a going concern. Take the situation here, I think Mr. Neill's testimony was in 1935 in the Washington Department rate case that going value was a million and a half dollars and here in this case Mr. Willard says it is three million today, and he also has quite a large difference in the value of the physical property. However, I do not see that that has any relationship with what you have in the Pacific Power & Light Company books—what the Pacific Power & Light Company paid for its property, or how its purchase price of a going concern should be divided up.

Q. Well, isn't the thing that is essential, if you are undertaking to suggest what is the wise managerial policy, isn't the thing which is essential to the management to know that the values are being maintained in its properties currently, as time goes on; isn't that the thing that is primarily essential?

A. Well, as far as the Company's accounts are concerned, it is important that any change in the value of those assets, [1025] accountingwise, on its books should be given recognition in the accounts.

Q. What do you mean by the values accountingwise? That is not quite clear to me.

Mr. Slaff: Had you completed your answer?

The Witness: Yes.

(Testimony of Melwood W. Van Scoyoc.)

By Mr. Laing:

Q. Go ahead.

A. Well, I simply mean this: Take your annual accrual for depreciation. Accountingwise it is called a valuation of the assets, annually. You evaluate so much of that cost as against this year's operations and so much against the next year's operations. You don't pay any attention to what some engineer might determine to be the accrued depreciation of the property, as measured by observed depreciation for the year 1940 and attempt to record that on your books. You have to record on your books the depreciation of those particular physical assets on the basis of the cost at which they were required.

Q. Well, from that standpoint, you are concerned with the mere matter of accounting records, regardless of values present or past, are you not?

A. Yes, that is true. We are concerned with what the Pacific Power & Light Company has on its books. [1026]

Q. But from the standpoint of the Company, the Company desiring to maintain itself in a solvent and healthy condition, the thing of prime importance is to be sure at any one time that its values, the values of all of its assets, are equal to its liabilities, including what is set up to surplus or reserve or other liability items, is it not?

A. Well, I think any business enterprise has to know that, or should know it.

Q. So that it gets down, from the standpoint of practical business management, that their value is

(Testimony of Melwood W. Van Scoyoc.)

very much more essential than what kind of figures may have been recorded on its books years ago as cost, isn't it?

A. Well, as far as my thinking on that subject is concerned, cost as recorded on the books is one of the best criteria of value, looking at it from the standpoint of an accountant. Some economist or engineer might have a different concept as to what the value might be.

Mr. Laing: I think we understand each other on that.

Q. I have just one or two more questions, Mr. Van [1027] Scoyoc. Getting back to this investment that was made in Account 100.5, which is now represented by your classification in Account 100.5, you made a suggestion in connection with that, that the amount should be charged up over a period of time. I have lost my memorandum, but you suggested a writing of it off over a period of time by charges to a certain account. Do you recall what your testimony was in that respect?

A. I recommended, I believe, from 10 to 15 years through Account 537, in equal annual installments.

Q. In your previous discussion of the investment in Account 100.5 you recognized that, as I understand, as a legitimate investment in the business, isn't that right?

A. Well, it was a legitimate investment at that time.

Q. In other words, it is all part of the invest-

(Testimony of Melwood W. Van Scoyoc.)

ment which is devoted to public use and service, is it not? A part of the utility?

A. I find a little difficulty in answering that question categorically, Mr. Laing. The investments were made in going concerns, and whether that investment was all dedicated to public service is somewhat questionable in my mind—that is, I am thinking of the idea as to whether it should be a proper part of the rate base. I am thinking in that light.

Q. You recognize it as a legitimate investment in the business that the utility is carrying on, do you not? [1028]

A. I recognize it as a legitimate investment at the time, in acquiring going concerns.

Q. And this Account 537, that is suggested be used for amortization charges, does not have the effect of requiring the utility user to pay any part of the cost of the disappearance of this amount, does it?

A. It does not. As I have treated it for the purpose of disposition, it is not included in what we term the operating income section of the Company's income statement.

Q. In other words, if it were treated the way you recommend, it would not be a part of the operating expenses? The charge would not be a part of the utility operating expenses, would it?

A. That is correct.

Q. Now, you have an account—the Commission has an account in its classification designated as Account 505, does it not? A. Yes, sir.

(Testimony of Melwood W. Van Scoyoc.)

Q. And that account does contemplate the possibility of this very thing that we have just been discussing, does it not?

A. It is an account similar to 537 in that it states that amortization of the acquisition adjustment can be included in there. [1029]

Q. Would you mind reading it, just so we will have it in the record, at this point? A. Yes.

(Reading) "Paragraph 5. Amortization of Electric Plant Acquisition Adjustment. (a) This account shall be debited or credited, as the case may be, with amounts included in operating revenue deductions for the purpose of providing for the extinguishment of the amount in Account 100.5, Electric Plant Acquisition Adjustments, pursuant to approval or order of the Commission.

(b) Amounts recorded in this account shall be concurrently debited or credited, as the case may be, to Account 252, Reserve for Amortization of Electric Plant Acquisition Adjustments."

I think it would probably be well to read this Account 537 in here.

Q. Yes, please do so.

A. (Reading) "537. Miscellaneous Amortization. This account shall include amortization expenses not elsewhere provided for in the System of Accounts, and also such amounts as the Commission may, by order, require to be included herein, such as amortization of amounts in account 100.5, Electric Plant Acquisition Adjustments."

Q. But, at least, one difference between the two

(Testimony of Melwood W. Van Scoyoc.)

accounts for this amortization of electric plant acquisition [1030] adjustments, would be that in the one case, the using up, or wearing out, if we may use that term, of the investments in Account 100.5 is recognized as an operating expense—as a utility operating expense—and, therefore, paid for by the people who have the benefit of the service; whereas, in the other case, that would not be true; isn't that correct?

A. Yes. In using Account 505 it does give such recognition by virtue of the fact that the annual amount is included as an operating revenue deduction, and my thinking on that subject is this: that I do not believe in a proceeding of this kind that there should be sanctioned, or given approval to, an amount to be included in operating revenue deductions which should be charged against the rate payers in Oregon and Washington. In other words, I think that is a matter which is much more appropriately within the province of the regulatory bodies who are actually fixing the rates and who have an opportunity at that time to consider the subject. Furthermore, within this \$2,700,000 which I have made a recommendation for disposition is a great deal of intangibles that I am positive, based upon my examination of the Company's files, are nothing more than good will. In other words, it is merely a capitalization of earning power, and I do not think, under any regulatory concept that I am familiar with, that that is considered a proper thing to be charged against the rate- [1031] payers.

(Testimony of Melwood W. Van Scoyoc.)

Q. Well, you said a little while ago that you recognized it as a legitimate arms-length investment in the business, did you not?

A. Yes, but that doesn't—I tried to distinguish that, Mr. Laing, between a legitimate arms-length investment, looking at it from the standpoint of stockholder and management, and whether or not that investment should be considered a rate base, and I don't think that we can so consider it by any standards of rate making.

Q. Well now, this particular proceeding——

A. (Interposing) First, may I give you a little more on that?

Q. Surely. Just continue.

A. There is another reason that I feel in this particular case influences my thinking that this amount should not be a part of the rate base, because I know two or three of these acquisitions that were made were for the purpose of keeping Byllesby out of the field, or Foshay, or Mr. Welch, from taking possession of some little system, or utility, right in the center of what you consider your territory, and there is competition as between what you will pay and what they are willing to pay for the same property, and from that standpoint, I don't think it would be proper to just say the rate base should include that excess investment over original cost. [1032] I think it is a matter that might very well appropriately be presented to a regulatory commission in a rate proceeding where .

(Testimony of Melwood W. Van Scoyoc.)

opportunity would be had to go into all the benefits which might have accrued by reason of such purchase, if there were any, to the particular rate payers affected.

Q. Now, in this particular case, of course, we are not attempting to fix any rate base, are we, Mr. Van Scoyoc? A. No, sir.

Q. Or attempting to regulate any rates in this particular proceeding? A. That is right.

Q. And as I understand it, the explanation of your suggesting that these amortization charges be made to Account 537, rather than to 505, it is that the determination of any amortization which should go into Account 505 should be made by either the Oregon or the Washington Commissions, is that right?

A. Well, I think in a rate proceeding, if your company makes a claim, as it did in the Washington case, for example, which was disallowed by the Washington Commission, and finally went to Court, that as to this excess between original cost, as they determined it in that proceeding, and the investment of the American Power & Light Company, that that is a proper place to consider the matter.

Q. Well, as I read this classification and the [1033] definition of Account 505 of this classification, which I believe is Exhibit No. 1 in this proceeding; is it, Mr. Slaff?

Mr. Slaff: I think it is in evidence in the proceedings by reference. I am advised, at least, that it is in the proceedings.

(Testimony of Melwood W. Van Scoyoc.)

By Mr. Laing:

Q. The term "Commission" where used in that classification applies to the Federal Power Commission, does it not? A. Yes.

Q. So that if we should have a rate case out here in Oregon, for example, and the Commissioner, after full consideration of all the circumstances, were faced with a proposal that some part of this Account 100.5 investment should be amortized by charges through Account 505, and he should be convinced that that should be done, we still wouldn't have satisfied the requirement of this reclassification, would we, by pursuing that arrangement?

A. Well, I think the Federal Power Commission, if a situation such as that arose, would give a very good deal of weight to the findings of the Oregon Commissioner, it seems to me, in that respect, or to any other state commission.

Q. As the classification and the situation stand, [1034] you might easily have one of these bodies deciding that it was proper and the other one deciding that it was improper, might you not?

A. Based upon my 14 years experience in this particular work with the regulatory agencies, both state and federal, I don't visualize any such possibility.

Q. You have heard the statement that reasonable men disagree once in a while?

A. Surely, I think there are differences of opinion; but whether they may be expressed in formal

(Testimony of Melwood W. Van Scoyoc.)

orders and contrary one to another is something else.

Q. I am just wondering what sort of a quandary the Company might be in if the Federal Power Commission said No and the Oregon Commissioner said Yes to such a proposal.

A. Well, that would be pure speculation on my part.

Q. It might be on ours too.

A. So far, we have gotten along very well.

Mr. Laing: That is all.

Trial Examiner: Have you any questions, Mr. Foley?

Mr. Foley: I feel further cross examination would only develop or emphasize our differences of opinion, which seems to be fairly well established.

As regards the proposition for the disposal of items in 107, I feel that involves legal questions as to which opinion [1035] evidence of a witness is probably incompetent, irrelevant and immaterial, and I will not cross examine.

Trial Examiner: I think, Mr. Foley, that there is perhaps some merit in what you say. However, it occurred to the Examiner that no one would be so naive as to believe that the proceedings would be disposed of ultimately without conference at least by the Commission with the members of the Commission's staff; and I think it is well to place before you at this time the thoughts of the staff of the Commission and afford you an opportunity to

(Testimony of Melwood W. Van Scoyoc.)

explore those thoughts; and that is the reason that the Examiner permitted this testimony; and I think that while it is permitted against your will, it would be more helpful than harmful.

Mr. Slaff: That, I might observe, is precisely why we presented this testimony by Mr. Van Scoyoc as to disposition, so that we could get right at the outset the views of the Commission's staff as to how the matter should be handled, and if the respondent or intervener chose to explore those views they could do so at such length and to such purpose as they might deem fit.

Trial Examiner: Do you have any redirect?

Mr. Slaff: I have no redirect of Mr. Van Scoyoc. [1036]

CHARLES W. SMITH

called as a witness on behalf of the Commission, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Slaff:

Q. Will you give your name to the reporter,
Mr. Smith? A. Charles W. Smith.

Q. What is your business?

A. I am Chief of the Bureau of Accounts, Finance and Rates of the Federal Power Commission.

Q. Will you please state now your background

(Testimony of Charles W. Smith.)

of education and experience relevant to this proceeding?

A. I have a B. S. degree in finance and business administration and, also, hold an L.L.B. degree. I am a certified public accountant of North Carolina and of Maryland, the first having been obtained about eighteen years ago. I am a past president of the Maryland Association of Certified Public Accounts and a member of the American Institute of Accountants, the American Accounting Association, the American Economic Association, the American Bar Association, and an honorary member of Delta Sigma Pi, an international commerce fraternity, the Alpha Beta Psi, a national accounting fraternity. I am also a member of the Committee on Statistics [1037] and Accounts and of the Committee on Depreciation of the National Association of Railroad and Utilities Commissioners. I have been admitted to the bars of the Court of Appeals of Maryland and the Supreme Court of the United States.

Q. How long, by the way, have you been a member of the two committees of the National Association of Railroad and Utilities Commissioners?

A. I was a member of the Committee on Statistics back in 1933 or 1934, I believe. In 1935 I resigned my membership because I was associated with the Federal Power Commission, and the Chief Accountant of the Commission was also a member of that committee, and I didn't think two of us should represent the same agency. I again became

(Testimony of Charles W. Smith.)

a member of the committee in about 1937 or 1938. I have been a member of the depreciation committee for three years.

Q. Will you continue, please?

A. For nine years I was an auditor in the Income Tax Unit of the U. S. Treasury Department and, in this capacity, I audited the income tax returns and books and records of practically every type of business corporation, including public utilities. On June 1, 1929, as the result of obtaining the highest mark in a competitive examination, I became the Chief Auditor of the Public Service Commission of Maryland, remaining in that position for seven years. I joined the staff of the Federal Power Commission on July 1, [1038] 1936, in substantially my present capacity.

Q. The title was something else at the time you joined, but the duties were substantially the same?

A. The duties were substantially the same. Since I joined the staff of the Commission more work has been transferred to me from other divisions, as a matter of fact, but my duties are substantially the same as when I first went there.

Q. Proceed, please.

A. For ten years I taught accounting in evening schools in Baltimore, including eight years at Johns Hopkins University when I gave the course in accounting systems and for two years the course in cost accounting. These courses were for day and evening students both.

While with the Maryland Commission, I did a

(Testimony of Charles W. Smith.)

good deal of work as consultant in accounting, taxation and finance in my spare time. On one occasion, I obtained leave of absence to do some work of a consulting nature for the Tennessee Valley Authority; and on two other occasions I was granted leave to act as consulting accountant to the Federal Power Commission.

Q. What was the nature of your consulting work for the T. V. A.?

A. It was for the purpose of reviewing the accounting system of T. V. A. and reviewing a proposed new system which [1039] T. V. A. proposed to install.

Q. And what consulting have you done while with the Maryland Commission and with the Federal Power Commission?

A. On two occasions, I was retained by the Federal Power Commission as a consultant. I supervised the drafting of a uniform system of accounts, which the commission later prescribed for public utilities, the system which is involved in these proceedings. I have also obtained one leave of absence from the Federal Power Commission to act as consultant to the Civil Service Commission of New York in connection with the grading of senior public service commission accountants and rate case experts.

I have written several articles on accounting and economic subjects, including a text on accounting systems for my classes at Johns Hopkins. I under-

(Testimony of Charles W. Smith.)

stand that the letter text is still being used. I have delivered a great many lectures, more than fifty, on accounting, financial and economic subjects, including two radio addresses.

While in the employ of the Public Service Commission of Maryland, I had charge of all accounting, auditing and financial matters which were under the jurisdiction of that body. This included the making of the usual accounting investigations for all regulatory purposes, all studies relating to the issuance of securities, financial structures, rate of return, and so forth. [1040]

In my present position, I have charge of four divisions of the Federal Power Commission, namely, the Division of Accounts, Division of Finance and Statistics, Division of Rates and the Division of Original Cost. I organized the Division of Original Cost for the Commission and have participated most actively in supervising the work of that division. For instance, Mr. Van Scoyoc, Chief of that Division, and I determined jointly when the reclassification study of the Pacific Power & Light Company should be investigated and we determined jointly the men who should be in charge of the field work. I have kept in close touch with the work since it started.

Q. And in connection with your duties for the Federal Power Commission, do you have duties in connection with interpreting the system of accounts regularly?

(Testimony of Charles W. Smith.)

A. Yes, I issue interpretations of the system of accounts over my own signature.

Q. Those go to your staff people and others on the staff of the Commission?

A. They go to the staff of the Commission, and they go to the utilities as well.

Q. Mr. Smith, you have approved the staff report identified as Exhibit No. 16 in this case, have you not? A. I have.

Q. There is now proposed by the staff to be included [1041] in Account 107 the amount of \$4,122,-173.16. Do you agree with this classification?

A. I do.

Q. Why?

A. Because the amount represents the profits to an affiliated seller, and affiliated company profits in the plant accounts are properly classifiable in Account 107 until disposed of as approved or directed by the Commission.

Q. Why do you believe affiliated company profits in the plant accounts should be classified in Account 107?

A. The text of Account 107 reads as follows:

“This account shall include the difference between the original cost, estimated if not known, and the book cost of electric plant, at the effective date of this system of accounts, to the extent that such difference is not properly includible in Account 100.5, Electric Plant Acquisition Adjustments. Write-ups of electric plant prior to the effective

(Testimony of Charles W. Smith.)

date of this system of accounts shall be recorded herein."

In my opinion, the amount mentioned represents a writeup; hence is includible in Account 107.

Q. On what do you base your statement that the amount is a write-up?

A. There are many ways of accomplishing write-ups. One of the favored ways practiced by public utilities has [1042] been through sales from one affiliated company to another. When transactions are between affiliates, the buyer and the seller, for all practical purposes, are the same. In a real sense the money is taken from one pocket and put in another. Accountants, for as long as I can remember, have eliminated such profits in the preparation of consolidated financial statements. The Federal Trade Commission, in its investigation covering public utility companies, referred to such items as write-ups and as inflation. Ever since I have known anything about regulatory accounting, items of the nature I am discussing have been considered write-ups. I have always considered them to be such and I have always eliminated them from the plant accounts. In other words, the amount of \$4,122,-173.16 is not a cost to the accounting utility in the proper sense of that term. Instead, it is an inflationary item.

Q. You say the amount is not a cost in the proper sense of that term. I take it, then, that it is not a cost as used in the text of Account 100.5, wherein it is stated generally that the amounts included in

(Testimony of Charles W. Smith.)

that account represent the difference between cost to the accounting utility and original cost?

A. That is correct. The term "cost" as applied to the accounting utility does not, in my opinion, include payments for profits to affiliated sellers.

[1043]

Q. Is the term "cost" defined in the Commission's Uniform System of Accounts, and if so, what is that definition?

A. "Cost" means the amount of money actually paid for property or services or the cash value at the time of the transaction of any consideration other than money.

Q. What makes you think the definition of "cost" does not include payments for profits to affiliated sellers?

A. The term "cost" in a sense is a word of "art", as the lawyers say. It necessarily means legitimate cost. This is the accounting meaning, I am sure. If a cost is not found to be proper, accountants will not recognize it, even if a payment were actually made. In addition, our System of Accounts provides (General Instruction 2F) that all charges to the plant accounts shall be just and reasonable. So-called costs which represent payments of affiliated company profits are not just and reasonable, and certainly they could not be just and reasonable, when a public utility is the purchaser. As I have indicated before, I have never recognized such payments as proper cost under any system of accounts, and I

(Testimony of Charles W. Smith.)

know of no public service commission accountant who has recognized them as such.

The Federal Power Commission has been dealing with the word "cost" for a great many years. Under the Federal Power Act the Commission has been determining the actual legitimate original cost of licensed projects since 1920, [1044] according to the 1914 classification of accounts issued by the Interstate Commerce Commission. As a matter of fact, the Federal Power Act requires that the latter system be published along with any system promulgated by the Commission for licensees. The Federal Power Commission has never determined that the word "cost" included affiliated company profits. On the contrary, it has steadfastly maintained that affiliated company profits were not includible in the cost of licensed projects. In one case involving the Alabama Power Company, the Commission disallowed affiliated company profits and was sustained by the Court of Appeals for the District of Columbia, The Commission's decision was made in 1932. I think the staff report was made in about 1930, a good many years before I joined the staff of the Federal Power Commission. The action of the Federal Power Commission, as I have indicated, has been consistent, and has been in accordance with recognized accounting principles.

Mr. Laing: May I interrupt a moment, Mr. Smith? I was just interested to know for the sake of the record whether the case Mr. Smith is referring to is this case, (indicating volume of Federal Law

(Testimony of Charles W. Smith.)

Reports). If that is the case, perhaps you can cite it in the record.

The Witness: Yes, that is the case.

Mr. Laing: Would you kindly give the citation?

The Witness: That is the case of Alabama Power Company [1045] vs. McNinch, 94 Federal 2d, 601.

Mr. Laing: Thank you very much.

A. (Resuming) I might add that one of the chief reasons for prescribing the new system of accounts adopted by the Commission in 1936 was to correct the conditions disclosed by the Federal Trade Commission in its investigations of public utilities. It will be recalled that the Federal Trade Commission exposed large write-ups in public utility plant accounts. The reports of that Commission were chiefly responsible, I believe, for the Public Utility Act of 1935, which act, among other things, gave the Federal Power Commission jurisdiction, generally speaking, over electric utilities engaged in interstate commerce. To have given the word "cost" any different meaning in the System of Accounts than that ascribed to it in my present testimony would be to defeat one of the chief purposes of the System of Accounts. Thus, I believe it abundantly clear that where an operating utility pays more than the cost of operating units or systems to an affiliated seller, the amount paid as profit to the seller clearly belongs in Account 107 in the operating utility's books of account.

Q. Mr. Smith, what is the nature of the amounts includible in Account 100.5?

(Testimony of Charles W. Smith.)

A. As the text of that account provides the difference between cost to the accounting utility and the original [1046] cost relating to the acquisition of operating units or systems are includible in that account. Our experience indicates that normally the amounts are debit items, and I shall have debit items in mind in speaking hereafter of amounts in that account. These debit amounts represent the cost of tangible or intangible property, and in some cases a single purchase may involve amounts classifiable in part to each item.

Q. What in your opinion is the maximum amount of any purchase price which might be assigned to tangible property?

A. The very maximum or ceiling is represented by the cost of reproduction less depreciation. I would like to indicate clearly, as Mr. Van Scoyoc has also pointed out, that the cost of reproduction less depreciation is not a full and complete determinative of the part of the purchase price assignable to tangible property, but rather it represents the maximum so assignable. Any cost in excess of the amount which would be required to purchase the same or similar articles as mere physical articles and not as a going concern, represents the cost of intangibles. The estimated reproduction cost less depreciation, however, might be greatly in excess of the cost of the tangible property. In other words, reproduction cost less depreciation is not a sole guide but is useful in determining the maximum

(Testimony of Charles W. Smith.)

part of a purchase price which in given cases can be assigned to [1047] tangible properties.

Generally speaking, it is my experience that the excess of cost to an accounting company over original cost represents the cost of an intangible. This is so because by their very nature physical properties are subject to depreciation. Depreciation is the inexorable law as to them. As stated by one author, all machinery and equipment are on an irresistible march to the junk heap. I have had much experience in observing the sales of physical properties, and this experience demonstrates conclusively to me that only in extremely rare cases do we find such property selling at more than original cost when they are not attached to going businesses. Hence depreciation rather than appreciation is the force which is constantly operating on physical properties.

Q. Assuming that the amounts classifiable in Account 100.5 in this case represent the costs of intangibles, how should the amounts be disposed of in your opinion?

A. The amounts which the staff recommends be included in Account 100.5 represent acquisitions made in 1910 and 1930, although the latter acquisitions go several years back of 1930 when the properties involved were purchased by an affiliated seller. Hence these intangibles have been on the books a long time. I agree that we speculate when we try to determine the exact nature of the intangibles. Generally, the intangibles, consisting of good will,

(Testimony of Charles W. Smith.)

going value, [1048] franchise value, monopoly value, nuisance value, et cetera, which are all rooted in prospective earning power, merge and blend into one when it comes to public utilities. Such values are most unstable. They have no permanent place in the accounts of a public utility. We should not assume that the prospective earnings will always be higher than the earnings on proper plant costs, exclusive of intangibles. In my opinion all amounts in the plant accounts should be charged off some time. The cost of physical items should be removed when the properties with which they are associated are retired. Intangibles are evasive and disappear without being seen. We only perceive the result of their disappearance. Thus rapid charge-offs of intangibles are required, I believe, by good accounting, good management and good regulation. Customers pay high rates; high rates result in high returns; high returns result in the purchase price being high for intangibles, and then it is sometimes said these intangibles, because they have been paid for by the acquiring company, go on forever. We are reasoning in a vicious circle when we reason in this manner. I think the only fair thing, the only proper thing, from the viewpoint of accounting, is to charge such amounts off quickly. It is the public policy in a good many states that no amounts should be kept alive as franchise costs in excess of the amounts paid to the governmental agency. We should not permit amounts which [1049] represent

(Testimony of Charles W. Smith.)

franchise costs to be buried in some other accounts in opposition to this public policy. As I have indicated, public utility intangibles sort of merge or blend together, prospective earnings being the important thing; these are often geared to franchise rights.

The quicker the amounts representing the cost of intangibles are charged off, the quicker the improvement will be realized in the financial structure of the company. The sounder the corporation is financially, the easier it is for commissions to do their regulatory job, the better it is for the customers, and the better it is for investors. The smaller the amount a public utility corporation has in its balance sheet for such intangibles as I have mentioned, the sounder that corporation is—all other things being equal.

The amounts I am discussing have been in the accounts of the Pacific Company for a very long time. The conditions under which the properties were bought will not go on forever. Changes are constantly taking place. New forces, new inventions, new economic conditions prevail. I think, therefore, that these amounts which have already rested in the accounts a very long time ought to be disposed of quickly. It is my opinion that they should be disposed of over a period not in excess of 10 or 15 years at the most.

In the public utility field earnings are based upon [1050-51] plant. There is great possibility that these intangibles which, as I have indicated, have

(Testimony of Charles W. Smith.)

been carried on the books for a long time, and which relate pretty largely to conditions in the past, may have no value whatsoever for the purposes of rate making or for security purposes. If that be true, then these amounts represent unrealizable costs. In other words, in the public utility accounting field we ought to be particularly cautious and not carry in the plant accounts items concerning which there may be grave question as to validity.

Q. To what account should the amortization of amounts representing the cost of intangibles, included in account 100.5, be charged if the Commission should approve an amortization plan such as you have suggested?

A. The amounts I believe should be amortized by charges to Account 537, Miscellaneous Amortization. I believe the best accounting practice is to charge off the cost of intangibles to the final section of the income statement, and Account 537 seems most appropriate in this connection.

Q. Mr. Smith, you have already testified as to one amount which you state should be included in Account 107, namely, the amount of \$4,122,173.16. The text of Account 107 provides that the amount therein shall be disposed of as the Commission may approve or direct. The company has submitted no plan for disposing of that amount. What [1052] disposition do you recommend?

Mr. Laing: Mr. Examiner, I wish at this time to make the same objection made before to similar

(Testimony of Charles W. Smith.)

questions and testimony offered in connection with Mr. Van Scoyoc.

Trial Examiner: Very well. The objection is overruled.

A. (Continuing) As far as accounting principles are concerned, I believe the amount should be written off either to Earned Surplus or to Capital Surplus immediately. The item has no place in the accounts of the Company. I have indicated as clearly as I can an operating public utility should not reflect in its plant accounts profits paid to an affiliated company. If the amount does not represent a proper cost of plant, it does not represent the cost of any asset. As a matter of policy, and not as a matter of accounting, the Commission may depart from the best accounting practice by considering special circumstances. The Commission may conclude that as a matter of policy it should give special consideration to the position of the preferred stockholders. An immediate charge-off against Earned Surplus might have the effect of preventing payments of dividends on preferred stock for some time in the future. To prevent this condition from coming about, the Commission may resort to what is sometimes termed "regulatory expediency" and require rapid amortization of the amount instead of an immediate charge-off. [1053] If the Commission should decide not to order an immediate charge-off, I am sure it will take appropriate steps, and I would recommend appropriate steps be taken to prevent the payment of common

(Testimony of Charles W. Smith.)

stock dividends until the amount has been disposed of.

By Mr. Slaff:

Q. Is your opinion based solely upon the provisions of the Commission's Uniform System of Accounts?

A. No. My answer would hold under any system of accounts. The amounts should never have been lodged in the plant accounts, in my opinion. Our System of Accounts requires the classification of the amounts in Account 107. In recommending an immediate charge-off I am not doing so because of any peculiar provisions or characteristics of the Commission's accounting system, but rather under general principles of accounting, particularly regulatory accounting.

Q. Do you think the fact that these transactions were entered into many years ago justifies retention of them in the accounts of the Company?

A. No. The Company has been a public utility since its inception. All of its transactions must have been entered into with the full recognition that it was subject to whatever direction future regulation might take. The lapse of time cannot give any greater validity to the transactions than they enjoyed when they were entered into. I [1054] have already indicated that in my opinion the amounts in question should never have been recorded in the books of account of the Company. It follows that I do not believe the fact that these items were recorded years ago and that a long time

(Testimony of Charles W. Smith.)

has since elapsed is any argument for their retention.

Q. Just one more question. In his testimony, Mr. Van Scoyoc discussed certain other specific adjustments which you have not covered specifically in your testimony. I should like to inquire of you whether you agree with Mr. Van Scoyoc's testimony and his recommendation.

A. I do. [1055]

CHARLES W. SMITH

called as a witness on behalf of the Commission, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination

By Mr. Laing:

Q. I have just a few questions I want to ask you, Mr. Smith, and it is, primarily, for the purpose of getting the record clear on one particular point. You spoke, in your testimony, Mr. Smith, about the fact that the Federal Power Commission had been dealing with the word "cost" for a good many years; under the Federal Power Act, the Commission had been dealing with "actual legitimate original cost", licensed projects since 1920, in accordance with the definitions of that act, or requirements of that act. That is the act that was originally referred to as the Federal Water Power Act, and was amended in 1935 to become the Federal Power Act, was it not?

(Testimony of Charles W. Smith.)

A. Yes; that is correct.

Q. And that act, as it stood, prior to 1935, related exclusively to licensing of projects to be built on either [1056] navigable streams or lands that were under the control of the Federal Government, did it not?

A. Yes, sir.

Q. And the general scheme of that act with respect to licenses was to provide, was it not, for license agreements between the Federal Government and the licensee, setting out the terms and conditions under which the licensee would be permitted to occupy either the bed of a navigable stream or occupy Federal land?

A. I think that is correct.

Q. And that license was in the nature of a contract, then, was it not, between the licensee and the Government?

A. I don't know whether it was a legal contract, but it certainly was an agreement in that, before the license could become effective, it had to be accepted by the licensee.

Q. And one of the stipulations or conditions, provided by the act with respect to such license, was in the following language, which I shall read and see if you agree with it. I will quote from Section 6 of the Act.

“Which such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this act, and such further conditions, if any, as the Commission shall prescribe in conformity with this act, which said terms and conditions

(Testimony of Charles W. Smith.)

and the acceptance thereof shall be expressed in such license.” That is the end of the quote. That was a [1057] part of the scheme of things under which these licenses were issued, was it not?

A. Yes, sir.

Q. And the act also provided for a right of recapture by the Government of the project, at the end of the license period, on paying the net investment to licensee? A. That is correct.

Q. And the net investment was defined in the act as,—the effect of it was, actual legitimate cost, less removals and depreciation, and things of that kind?

A. Yes, less the depreciation reserve and surplus earnings, and a few items of that nature. The statement was just made that the projects were recapturable on the payment of the net investment. I don’t know whether the provisions dealing with,—that is, less than the net investment, with a qualification I would like to make, and with the exception of that qualification, the general statement is correct.

Q. But there is a limitation that it could not be more than the net investment?

A. There was a limitation that it could not be more than the net investment.

Q. And if it was worth less, they did not have to pay the higher sum? A. That is correct.

Q. The actual legitimate original cost was a word [1058] of art in this act, also, was it not?

(Testimony of Charles W. Smith.)

A. I think that referred to the ICC system, Mr. Laing.

Q. The term "cost" there was refined as including, insofar as applicable, the elements prescribed in the Interstate Commerce Commission's classification, isn't that correct?

A. Yes, sir.

Q. But the phrase, "actual legitimate original cost," was the keystone of the whole matter so far as it applied to the recapture and other provisions, was it not?

A. The actual legitimate original cost is the language of the act itself, but the act said the cost shall be determined according to the elements mentioned in the ICC system. The words "actual legitimate original cost" did not appear in the ICC system. The word which does appear is the word "cost". At least, as far as I see it, they were in its classification.

Q. And the act further qualifies "cost" by its being the actual legitimate original cost, does it not?

A. That is the language of the act; yes, sir.

Q. In other words, the term "original" is an additional qualification of the word "cost", as defined in the Interstate Commerce Commission's classification, is it not?

A. The word "original" appears in the act, but it does not appear in the ICC classification.

Q. In other words, the act added that additional

(Testimony of Charles W. Smith.)

[1059] qualification of the kind of cost that had to be used, did it not?

A. I think it meant what was contemplated by the ICC system; otherwise, there would have been no need to refer to the ICC system, it seems to me.

Q. Well, it referred to the ICC system, did it not, for the purpose of defining "cost"; isn't that what the act did? A. I think so.

Q. And again, referring to the definition of "net investment" in Section 3 of the Federal Water Power Act, June 10, 1920, the term "cost" "shall include, as far as applicable, the things prescribed in the Commission's classification," isn't that right?

A. Yes, I think you are right. The staff, certainly, however, has not determined, or it has not been operating under the viewpoint that the word "original" modified or restricts the word "cost", as contained in the ICC system.

Q. I see. Well, at all events, the point that I really wanted to clarify was that so far as the application of the expression "original cost" by the Federal Power Commission, prior to 1935, it was confined to dealings with licensees who had contracts with the Governments, was it not?

A. That is correct. [1060]

Q. And, insofar as legislative compulsion, if we could call it that, applied the term "original cost" to the operations of utilities other than licensees, that came about for the first time after the jurisdiction of the Commission was extended to the interstate electric utilities in 1935, and the Commis-

(Testimony of Charles W. Smith.)

sion adopted its Uniform System of Accounting; isn't that true?

A. Yes, that is true. By the first time, do you mean the first time under the jurisdiction of the Federal Power Commission?

Q. That is right. I mean there was no state or Federal law—rather, there was no Federal law or administrative regulation prior to 1935 which made “original cost” the controlling factor in the classification of accounts of interstate electric utilities, was there? A. That is correct. [1061]

JOHN J. O'NEIL

recalled as a witness on behalf of the Commission, having been previously sworn, resumed the stand and testified further as follows:

Further Redirect Examination

By Mr. Slaff:

Q. Mr. O'Neil, I would like to call your attention to a question and answer at page 961 and page 962 of the transcript, the following question and answer on your cross examination occurred:

“Question: So the whole thing boils down in your mind to the fact that the American in 1910 was momentarily the owner of all the securities which the Pacific issued and exchanged for the properties which American turned over to Pacific at that time; isn't that true?”

“Answer: That is essentially correct, yes.”

Now, I want to inquire of you as to this: Assume

(Testimony of John J. O'Neil.)

that American had never owned the bonds and preferred stock of Pacific; that those had been disposed of by Pacific direct to the public, would that have affected your determination that the transaction involved a write-up to the same extent that you have already testified it involved such a right?

A. No. My answer would not have changed. It so happened that, in stating the question, Mr. Laing outlined [1062] all the circumstances that were peculiar to the 1910 transaction; but it is not the accumulation of all those that makes for the declaration of the amount as a write-up. The transfer of the properties could have been effected through a loan account, and Pacific subsequently sell its own bonds and its own preferred stock and pay off the loan, it is the controlling element there that resolves itself down to a write-up.

Q. In other words, is it true that there are several forms, or mechanical processes through which the deal could have been carried out and still arrive at the same kind of a write-up, which, in your judgment, did occur?

A. That is correct.

Q. Just one other thing: Assume that at some time subsequent to this transaction, American had sold off the common stock in Pacific, and all other factors remain the same to date, would you still consider that a write-up had occurred at the time of the transaction?

A. Oh, yes. A write-up had occurred, even in spite of the fact that American might have subse-

(Testimony of John J. O'Neil.)

quently sold off the common stock, which write-up is still on the books today.

Mr. Slaff: That is all I have.

Mr. Laing: No question. [1063]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,386

PACIFIC POWER & LIGHT COMPANY, and
AMERICAN POWER & LIGHT COMPANY,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

CERTIFICATE OF SECRETARY OF FED-
ERAL POWER COMMISSION TO TRAN-
SCRIPT OF RECORD

I, Leon M. Fuquay, Secretary of the Federal Power Commission and official custodian of the records of said Commission, do hereby certify that the attached are true copies of:

- (1) Transcripts of hearing held May 20, 21, 22, 23 and 24, 1940
- (2) Transcripts of hearing held September 29 and 30, 1941, October 1, 2, 3, 4, 6, 7 and 8, 1941

- (3) Exhibits introduced in evidence at the hearings held on May 20, 21, 22, 23 and 24, 1940, as follows:

Exhibit

No.	Description
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- | | |
|---|---|
| 1 | Federal Power Commission Order No. 42, dated June 16, 1936, entitled "Prescribing a System of Accounts for Public Utilities and Licensees under the Federal Power Act," which order incorporates the system of accounts therein prescribed. |
| 2 | Federal Power Commission Order No. 43 dated December 31, 1936, entitled "Amending the Uniform System of Accounts Prescribed for Public Utilities and Licensees by Order No. 42, and Adopting and Adding thereto Appendix III applicable to Class C and Class D Public Utilities and Licensees." |
| 3 | Federal Power Commission Order No. 45, adopted January 13, 1937, entitled "Prescribing a List of Units of Property for Use in Connection with Uniform System of Accounts." |
| 4 | Answer of Pacific Power & Light Company to the Commission's order to show cause of April 16, 1940, filed with the Commission on May 18, 1940. |
| 5 | Federal Power Commission's order of May 11, 1937. |

Exhibit

- | No. | Description |
|-----|--|
| 6 | Map entitled "Territory Served by Pacific Power & Light Company" dated December, 1936. |
| 7 | Pacific Power & Light Company's petition, dated December 20, 1939, for an extension of time to July 1, 1940. |
| | Note: Exhibits 1, 2, 3, 4, 5 and 7 were admitted in evidence by reference. |
| 8 | "Communications between Federal Power Commission and Pacific Power & Light Company relative to Compliance with Electric Plant Instruction 2-D and with the Commission's order adopted May 11, 1937 (except Order to Show Cause dated April 16, 1940)". |
| 9 | "Memorandum Concerning Present Status of Plant Classification Work of Pacific Power & Light Company Required by the New System of Accounts of Federal Power Commission and Public Utilities Commissioner of Oregon"; dated June 15, 1939. |
| 10 | Telegram dated November 22, 1938, from A. J. Stutzman to H. H. Scaff, Ebasco Services, Inc., 2 Rector Street, New York. |
| 11 | 8 sheets entitled "Statistical Information Relative to Electric Plant" applicable to "Production Plant" and "Transmission Plant" of Pacific Power & Light Company. |

Exhibit

No.	Description
12	A series of seven letters: Four from Will T. Neill to the Public Utilities Commissioner, Salem, Oregon, dated August 29, 1938, August 22, 1938, August 19, 1938, and August 12, 1938, respectively; and three from the Public Utilities Commissioner of Oregon to Pacific Power & Light Company, dated August 27, 1938, August 10, 1938, and July 28, 1938, respectively.
13	Letter from Ormand R. Bean, Public Utilities Commissioner of Oregon to Pacific Power & Light Company, dated December 11, 1939.

- (4) Exhibits introduced in evidence at the hearings held on September 29 and 30, 1941 and October 1, 2, 3, 4, 6, 7, and 8, 1941, as follows:

Exhibit

No.	Description
14	Letter dated July 1, 1940 from Will T. Neill, Vice President of Pacific Power & Light Company to Federal Power Commission.
15	"Pacific Power & Light Company, Reclassification of Electric Plant, Statements A to I Inclusive."

Exhibit

No.	Description
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- | | |
|------|---|
| 15-A | Four maps showing territory served by Pacific Power & Light Company at December, 1910, March, 1915, November, 1924 and December, 1936 together with a statement of Will T. Neill, Vice President of Pacific Power & Light Company, with respect to said maps. |
| 16 | "Report on the Reclassification and Original Cost Studies of Electric Plant, as at January 1, 1937" of Pacific Power & Light Company by the staffs of the Federal Power Commission and the Public Utilities Commissioner of Oregon. |
| 17 | Volume, dated September 26, 1941, containing Pacific Power & Light Company's revised Reclassification of Electric Plant Statements "B", "E", "F", "G", "H" and "I". |
| 18 | Letter dated September 27, 1941 from Will T. Neill, Vice President of Pacific Power & Light Company to Federal Power Commission transmitting copy of Exhibit 17. |
| 19 | Corporate Development Diagram of Pacific Power & Light Company. |
| 20 | Minutes of Special Meeting of Board of Directors of Pacific Power & Light Company held on July 23, 1910. |

Exhibit

- | No. | Description |
|-----|--|
| 21 | Minutes of Special Meeting of Board of Directors of Pacific Power & Light Company held on July 29, 1930. |
| 22 | Letter dated July 23, 1910 from S. Z. Mitchell to Guy W. Talbot. |
| 23 | Western Union Night Letter dated December 16, 1911 from F. G. Sykes to Guy W. Talbot. |
| 24 | Minutes of Special Meeting of the Board of Directors of Pacific Power & Light Company held on December 22, 1911. |
| 25 | Telegram dated December 17, 1913 from F. G. Sykes to Guy W. Talbot. |
| 26 | Minutes of Special Meeting of Board of Directors of Pacific Power & Light Company held on December 30, 1913. |
| 27 | Letter dated June 4, 1924 from C. E. Groesbeck to Guy W. Talbot. |
| 28 | Letter dated July 10, 1926 from Frank Silliman, Jr. to Guy W. Talbot. |
| 29 | Western Union Telegram dated December 21, 1927 from Frank Silliman, Jr. to Guy W. Talbot. |
| 30 | Western Union Telegram dated April 11, 1929 from Guy W. Talbot to Frank Silliman, Jr. |
| 31 | Western Union Telegram dated April 13, 1929 from Frank Silliman, Jr. to Guy W. Talbot. |

Exhibit

- | No. | Description |
|-----|---|
| 32 | Telegram dated June 16, 1910 from Simpson, Thacher and Bartlett to Neil A. Weathers. |
| 33 | Statement of Original Cost of Properties of Inland Power & Light Company as at March 31, 1937, which statement was introduced in evidence as Exhibit 8 in Federal Power Commission proceeding Docket No. IT-5469. |
| 34 | Minutes of a meeting of the Executive Committee of American Power & Light Company which was held on June 13, 1910. |
| 35 | "Statement of Cost to American Power & Light Company of common stock of Pacific Power & Light Company, as computed from statements prepared by D. W. Jack, Treasurer of American, furnished to staff of Federal Power Commission." |
| 36 | Letter dated September 10, 1940 from Will T. Neill, Vice President of Pacific Power & Light Company to John J. O'Neil transmitting "Statement of American Power & Light Company's Investment in the Companies and properties transferred to Pacific Power & Light Company at the formation of the latter company in 1910" together with said statement. |

Exhibit

No. Description

- 37 Letter dated December 27, 1940 from Will T. Neill, Vice President of Pacific Power & Light Company to James H. Flynn; letter dated December 23, 1940 from D. W. Jack, Secretary and Treasurer of American Power & Light Company to Will T. Neill; and "Statement of American Power & Light Company's Investment in the Companies and Properties transferred to Pacific Power & Light Company at the Formation of the latter Company in 1910."
- 38 Letter dated May 9, 1941 from Will T. Neill to James H. Flynn; letter dated April 29, 1941 from D. W. Jack to Will T. Neill; and statements with respect to American Power & Light Company's purchase of Condon Electric Company and Heppner Light & Water Company.
- 39 Letter dated May 9, 1941 from Will T. Neill to James H. Flynn; letter dated April 29, 1941 from D. W. Jack to Will T. Neill; "Statement of American Power & Light Company's Investment in Companies and Properties transferred to Pacific Power & Light Company in 1911;" and "Statement of American Power & Light Company's Investment in the Hydro Electric Company transferred to Pacific Power & Light Company—May 19, 1915."

Exhibit

- | No. | Description |
|-----|--|
| 40 | Letter dated January 30, 1941 from Will T. Neill to James H. Flynn; letter dated January 27, 1941 from D. W. Jack to Will T. Neill; and "Statement of American Power & Light Company's Cost of Performance of Agreement with Pacific Power & Light Company dated July 16, 1930." |
| 41 | Statement of "Investment in the Companies and Properties transferred to Pacific Power & Light Company under agreement with Weld M. Stevens dated July 23, 1910." |
| 42 | Statement entitled, "Pacific Power & Light Company, Reserve for Retirements (Depreciation) of Utility Plant as of December 31, 1936." |
| 43 | Tabulation entitled, "Pacific Power & Light Company, Reconciliation of Amended Reclassification Summary Statement of Commission Staffs with Reclassification Summary Statements as submitted by Company as of January 1, 1937." |
| 44 | Tabulation entitled, "Pacific Power & Light Company, Analysis of Costs Incurred by American Power & Light Co. in 1910 Transaction." |

Exhibit

- | No. | Description |
|-----|--|
| 45 | Tabulation entitled, "Pacific Power & Light Company, Amended Reclassification Summary Statement (Reflecting Adjustments of the Staffs of the Federal Power Commission and Public Utilities Commissioner of Oregon)." |
| 46 | Tabulation entitled, "Pacific Power & Light Company, Analysis of Account 100.5, Electric Plant Acquisition Adjustments, January 1, 1937." |
| 47 | Statement entitled, "Pacific Power & Light Company, Analysis of Account 107, Electric Plant Adjustments as Adjusted by Commission Staffs." |
| 48 | Excerpt from annual report of Pacific Power & Light Company to Public Utilities Commissioner of Oregon. |
| 49 | Uniform System of Accounts for Electric Utilities prescribed by Public Utilities Commissioner of Oregon, dated 1941. |
| 50 | Uniform Classification of Accounts for Electrical Utilities, effective January 1, 1925, prescribed by Public Service Commission of Oregon. |
| 51 | 1936 National Association of Railroad and Utilities Commissioners Uniform System of Accounts for Electric Utilities prescribed by the Department of Public Service of Washington. |

Exhibit

- | No. | Description |
|-----|---|
| 52 | Tabulation entitled, "Pacific Power & Light Company, Retirement and Depreciation Reserve for the State of Oregon." |
| 53 | Tabulation entitled, "Pacific Power & Light Company, Retirement and Depreciation Reserve for the State of Washington." |
| 54 | Tabulation entitled, "Pacific Power & Light Company, Analysis of Account 108 as shown in Revised Statement B, Page 47." |

Note: Exhibits Nos. 52, 53 and 54 were received in the record after the hearing was adjourned by stipulation of counsel dated April 8, 1942 (Item 17 herein).

- (5) The following documents, which were received in evidence by reference without assignment of exhibit numbers:

Description

Petition of Public Utilities Commissioner of Oregon to intervene, filed with the Federal Power Commission on July 21, 1941.

Petition of American Power & Light Company to intervene filed with the Federal Power Commission on August 28, 1941.

Description

Annual Report (FPC Form No. 1) to the Federal Power Commission of Pacific Power & Light Company for the year ended December 31, 1937.

Annual Report (FPC Form No. 1) to the Federal Power Commission of Pacific Power & Light Company for the year ended December 31, 1938.

Annual Report (FPC Form No. 1) to the Federal Power Commission of Pacific Power & Light Company for the year ended December 31, 1939.

Annual Report (FPC Form No. 1) to the Federal Power Commission of Pacific Power & Light Company for the year ended December 31, 1940.

Note: The Annual Reports are not included physically by agreement of counsel.

- (6) Order to show cause and fixing date of hearing entered April 16, 1940
- (7) Designation of Examiner Simpson to preside at hearing filed May 16, 1940
- (8) Order to show cause and fixing date of hearing, etc., entered July 1, 1941
- (9) Order permitting intervention of Public Utilities Commissioner of Oregon entered August 9, 1941

- (10) Order postponing hearing entered August 9, 1941
- (11) Order permitting American Power & Light Company to intervene entered September 16, 1941
- (12) Petition to intervene of Department of Public Service of Washington filed September 23, 1941
- (13) Designation of Trial Examiner Gray filed September 24, 1941
- (14) Order permitting Department of Public Service of Washington to intervene entered September 26, 1941
- (15) Pacific Power & Light Company's motion to dismiss filed September 29, 1941
- (16) Pacific Power & Light Company's answer to orders entered July 1 and August 9, 1941, filed October 7, 1941 (original answer said to have been filed September 29, 1941, with Examiner at hearing.)
- (17) Stipulation of counsel relative to disposition of certain amounts and admitting in evidence Exhibits 52, 53 and 54 filed April 9, 1942
- (18) Opinion No. 84 and order directing accounting entries, etc., entered and filed November 24, 1942
- (19) Pacific Power & Light Company's application for stay filed December 26, 1942

- (20) Pacific Power & Light Company's letter of transmittal dated December 24, 1942 and certified copies of entries filed December 28, 1942
- (21) Pacific Power & Light Company's application for rehearing filed December 31, 1942
- (22) Intervener's, American Power & Light Company, application for rehearing filed December 31, 1942
- (23) Order extending time within which to file certified copies of entries required by order of November 24, 1942, entered December 31, 1942
- (24) Order denying applications for rehearing entered January 13, 1943

All of which constitute the record of the Federal Power Commission in In the Matter of Pacific Power & Light Company, Docket No. IT-5611.

In Witness Whereof, I hereunto subscribe my hand and cause the seal of the Federal Power Commission to be affixed this 5th day of April, 1943 at Washington, D. C.

[Seal]

LEON M. FUQUAY

Secretary.

[Endorsed]: No. 10386. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Power & Light Company, and American Power & Light Company, Petitioners, vs. Federal Power Commission, Respondent. Transcript of the Record. Upon Petition for Review of Order of the Federal Power Commission.

Filed April 12, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10386

PACIFIC POWER & LIGHT COMPANY, and
AMERICAN POWER & LIGHT COMPANY,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITIONERS' STATEMENT OF POINTS

Come now Pacific Power & Light Company and American Power & Light Company, petitioners in the above-entitled cause, and adopt the assignments of error set forth in Article XI, and in paragraphs (1) to (15), inclusive, of Article XI, of their Peti-

tion for Review of Order of Federal Power Commission, filed herein on March 11, 1943, as their Statement of the Points on which petitioners intend to rely on the review in said cause.

Dated April 30, 1943.

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Public Service Building,
Portland, Oregon

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LAING GRAY & SMITH,

Portland, Oregon;

REID & PRIEST,

WHITE & CASE,

New York, New York,

Of Counsel.

CERTIFICATE OF SERVICE

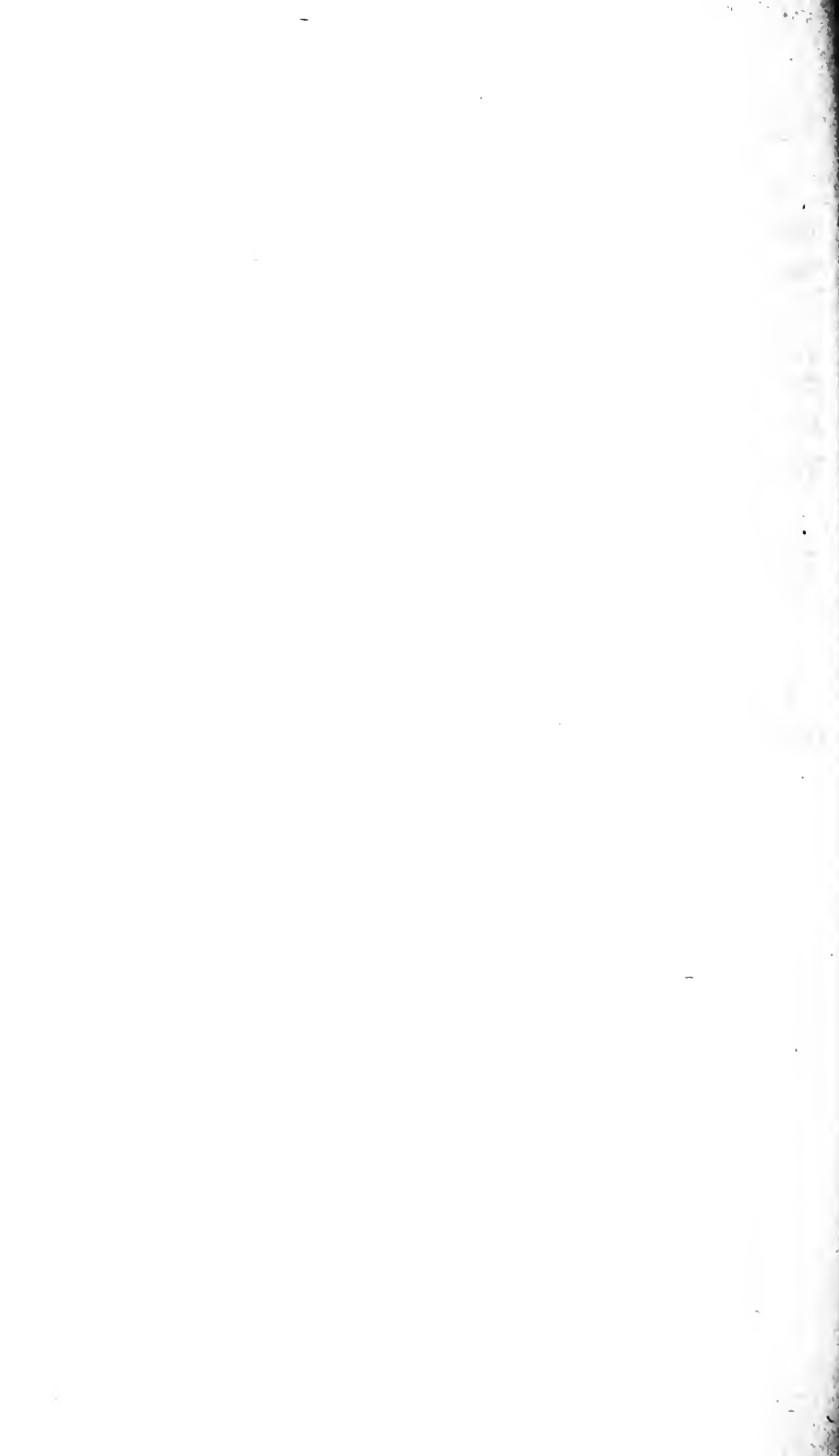
I hereby certify that on April 30, 1943, I served the foregoing document, entitled "Petitioners' Statement of Points", upon the Federal Power Commission, by mailing a copy thereof, properly addressed, postage prepaid, to Charles V. Shannon, Esquire, general counsel for the Federal Power Commission, at the office of said Commission at Washington, D. C.

Dated at Portland, Oregon, this 30th day of April, 1943.

JOHN A. LAING

Of Attorneys for Petitioners.

[Endorsed]: Filed May 3, 1943. Paul P. O'Brien, Clerk.



No. 10386

United States
Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC POWER & LIGHT COMPANY, and
AMERICAN POWER & LIGHT COMPANY

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

SUPPLEMENTAL
Transcript of the Record

UPON PETITION TO REVIEW AN ORDER OF THE
FEDERAL POWER COMMISSION

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10,386

PACIFIC POWER & LIGHT COMPANY, and
AMERICAN POWER & LIGHT COMPANY
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

SUPPLEMENTAL CERTIFICATION OF
TRANSCRIPT OF RECORD OF FEDERAL
POWER COMMISSION

I, Leon M. Fuquay, Secretary of the Federal Power Commission and official custodian of the records of said Commission, do hereby certify that the attached are true copies of:

(1) Letter of August 10, 1943 from John A. Laing to Leon M. Fuquay, Secretary, Federal Power Commission, transmitting on behalf of Pacific Power & Light Company, certified copy of that company's Journal Entry Voucher No. 519, dated July 27, 1943, transferring \$4,121,981.41 from Account 100.5, Electric Plant Acquisition Adjustments, to Account 107, Electric Plant Adjustments, in compliance with the provisions of Paragraph (A) of the Commission's order of November 24, 1942. (Vol. VIII, Page 2327.)

(2) Pacific Power & Light Company Journal Entry Voucher No. 519. (Vol. VIII, Page 2328.)

(3) Letter of August 16, 1943 from J. H. Gutride, Acting Secretary of Federal Power Commission to John A. Laing, acknowledging receipt of letter of August 10, 1943 and Journal Entry Voucher No. 519, both as described above. (Vol. VIII, Page 2329.)

All of which completes the record of the Federal Power Commission in the Matter of Pacific Power & Light Company, Docket No. IT-5611.

In Witness Whereof, I hereunto subscribe my hand and cause the seal of the Federal Power Commission to be affixed this 24th day of August 1943, at Washington, D. C.

(Seal)

LEON M. FUQUAY

Secretary.

[Endorsed]: Filed Aug. 30, 1943. Paul P. O'Brien, Clerk.

(Vol. VIII, page 2327)

Laing Gray & Smith
Law Offices
Public Service Building
Portland, Oregon

John A. Laing
Henry S. Gray
Allan A. Smith
Frederic A. Fisher
Francis F. Hill

August 10, 1943

Federal Power Commission Aug 12 1943 Received.

Received Aug 13 1943 Division of Original Cost.

Mr. Leon M. Fuquay, Secretary
Federal Power Commission
Washington, D. C.

Re: Pacific Power & Light Company
FPC Docket No. IT-5611

Federal Power Commission Docketed Aug 12
1943 Docket Section Secretary's Office.

Dear Sir:

In behalf of Pacific Power & Light Company, we are transmitting herewith certified copy of that company's Journal Entry Voucher No. 519, dated July 27, 1943, recording compliance by the company with the provisions of Paragraph (A) of the Commission's Order of November 24, 1942, requir-

ing the company to transfer from Account 100.5 to Account 107 the amount of \$4,121,981.41.

The company's compliance with this paragraph of the Order eliminates Paragraph (A) from the issues presented by the Petition for Review of this order filed in the United States Circuit Court of Appeals for the Ninth Circuit, and will have the effect of limiting the issues on that review to the questions involving Paragraphs (B) and (H) of the Order, and Paragraph (O) as applied to Paragraphs (B) and (H), relating to the "disposition" of the amounts now recorded in Account 107 and Account 100.5, respectively.

We are sending copies of this letter, with copies of the Journal Voucher, to Charles V. Shannon, General Counsel for the Commission, and to Messrs. A. J. G. Priest and Adrian L. Foley, counsel for American Power & Light Company, one of the petitioners in the pending review.

Very truly yours,

/s/ JN. A. LAING

Acknowledged Aug 12 1943 Secretary.

Received Aug 13 1943 Accounts, Finance & Rates.

Federal Power Commission
Aug 12 1943
Received

Vol. VIII, page 2328

Form 57

PACIFIC POWER & LIGHT COMPANY

Copy

July 27, 1943

Journal Entry Voucher No. 519

Utility Plant Adjustments, 107

4,121,981.41

To

Utility Plant, 100

Utility Plant Acquisition Adjustments, 100.5

4,121,981.41

4,121,981.41

To record the compliance by the Company with the provisions of Paragraph "A" of Federal Power Commission's Order, dated November 24, 1942, Docket No. IT-5611, requiring that "Pacific remove from Account 100.5, Electric Plant Acquisition Adjustments, and transfer to Account 107, Electric Plant Adjustments, the amount of \$4,121,981.41".

J. A. L. Aug. 9, 1943 O.K. P.B.M.

(Paul B. McKee)

(President of the Company)

Certified a true copy:

/s/ J. G. HAWKINS

Secretary and Treasurer

Entered:

Certified Correct

Approved:

J. G. HAWKINS

Treasurer or Assistant Treasurer

vs. Federal Power Commission

567

Via Air Mail

(Vol. VIII, page 2329)

In the Matter of
Pacific Power & Light Company,
Docket No. IT-5611

Aug 16 1943

John A. Laing, Esq.,
Public Service Building,
Portland, Oregon.

Dear Mr. Laing:

This will acknowledge receipt of your letter of August 10, 1943, transmitting, on behalf of Pacific Power & Light Company, a certified copy of that company's Journal Entry Voucher No. 519, dated July 27, 1943, transferring \$4,121,981.41 from Account 100.5, Electric Plant Acquisition Adjustments, to Account 107, Electric Plant Adjustments in compliance with the provisions of Paragraph (A) of the Commission's order of November 24, 1942, in the above-entitled matter.

As you state, this compliance with Paragraph (A) of the order of November 24, 1942, eliminates such Paragraph from the issues presented by the Petition for Review of the order, filed in the United States Circuit Court of Appeals for the Ninth Circuit (Pacific Power & Light Company, et al. v. Federal Power Commission, No. 10368). The effect of this compliance, however, on the issues presented by the Petition for Review as they relate to Paragraphs (B), (H) and (O) of the order is a matter

for legal argument and this letter is not to be construed as an acquiescence in the views expressed in your letter.

Very truly yours,

/s/ J. H. GUTRIDE

Acting Secretary.

cc—A. J. G. Priest, Esq.,

c/o Reid & Priest,

2 Rector Street,

New York, N. Y.

Adrian L. Foley, Esq.,

c/o White & Case,

14 Wall Street,

New York, N. Y.

[Endorsed]: No. 10386. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Power & Light Company and American Power & Light Company, Petitioners, vs. Federal Power Commission, Respondent. Supplemental Transcript of the Record. Upon Petition to Review an Order of the Federal Power Commission.

Filed August 31, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 10386

PACIFIC POWER & LIGHT COMPANY
AND
AMERICAN POWER & LIGHT COMPANY,
Petitioners,
vs.
FEDERAL POWER COMMISSION,
Respondent.

PETITIONERS' BRIEF ON REVIEW

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC POWER & LIGHT COMPANY
AND
AMERICAN POWER & LIGHT COMPANY,
Petitioners,
vs.
FEDERAL POWER COMMISSION,
Respondent.

No. 10386

PETITIONERS' BRIEF ON REVIEW

Introductory Statement

(a) Nature of Case—Jurisdiction of Court

This review involves the validity of Paragraphs (B) and (H) of an order of the Federal Power Commission dated November 24, 1942, which direct Pacific Power & Light Company to "dispose of" two amounts aggregating \$6,863,573.07, theretofore and now recorded on its books of account as part of the company's assets (R. 61-2). An amount of \$4,121,981.41 is ordered to be "disposed of" immediately, by charging \$1,135,113.91 to a special reserve created pursuant to a prior order of said Commission in another proceeding, and by charging \$2,986,867.50 to Earned Surplus, with permission to charge all or any part of the latter sum against a "Capital Surplus properly created for that purpose" (Paragraph B); and an amount of \$2,741,591.66 is ordered to be disposed of by charges to income in ten equal annual charges, beginning with the year 1942 (Paragraph H).

Petition for Review was filed herein pursuant to Section 313 of the Federal Power Act (16 U. S. C. A. § 825*l*). Pacific Power & Light Company and American Power & Light Company, the Petitioners, being aggrieved by the above provisions of said Order (R. 61-64), entered in said Commission's proceeding designated "In the Matter of Pacific Power & Light Company—Docket No. IT-5611", filed their Petition to obtain a judicial review of said provisions and the setting aside and annulment thereof.

Prior to the filing of the Petition for Review and within thirty days after the issuance of the Commission's Order, Pacific* and American, the latter an intervener in the proceeding, filed separate applications for a rehearing before the Commission (R. 64-71, 71-79); and both of said applications were denied by order of the Commission, dated January 13, 1943 (R. 80). Within sixty days thereafter (R. 110), said Petition for Review was filed in this, the Circuit Court of Appeals for the Ninth Judicial Circuit, in which Circuit are located Pacific's operations and properties involved in said proceeding, and its principal place of business for the conduct of said operations (R. 92, 99).

(b) Parts of Order Under Review

Petitioners designated in their said Petition for Review, as the parts of said Order by which Petitioners deemed themselves aggrieved and in respect of which review herein was sought, Paragraphs (A), (B), and (H) thereof, and Paragraph (O) as applied to said Paragraphs (A), (B), and (H). Petitioners have since concluded to withdraw their objections to Paragraph (A) of said Order, and Pacific has complied with the requirements of said paragraph by recording in its books of account the amount of \$4,121,981.41 in Account 107, Elec-

* Hereinafter for brevity, the following expressions will be used: "Pacific" for Pacific Power & Light Company; "American" for American Power & Light Company; the "Commission" for Federal Power Commission; the "Act" for the Federal Power Act, 16 U. S. C. A. §§ 791 et seq.; and the "Order" for the Commission's Order of November 24, 1942.

tric Plant Adjustments, as directed by said Paragraph (A). No issue, therefore, is presented to the Court herein concerning the validity of said Paragraph (A).

With this elimination, the parts of said Order in respect of which judicial review is sought herein are Paragraphs (B) and (H), and Paragraph (O) as applied to said Paragraphs (B) and (H), namely:

“(B) Pacific dispose of the amount of \$4,121,981.41 established in Account 107, Electric Plant Adjustments, under Paragraph (A) above, by charging \$1,135,113.91 of that amount to the special reserve created pursuant to the Commission’s Opinion No. 69; and by charging the balance of \$2,986,867.50 to Account 271, Earned Surplus; provided, however, that Pacific may charge all or any part of said \$2,986,867.50 against a Capital Surplus properly created for that purpose.

* * * * *

“(H) Pacific dispose of the amount of \$2,741,591.66 classified in Account 100.5, Electric Plant Acquisition Adjustments, by charging said amount to Account 537, Miscellaneous Amortization, in ten equal annual charges, commencing with the calendar year 1942;

* * * * *

“(O) Pacific file with the Commission on or before December 31, 1942, certified copies of the entries required by Paragraphs (A) to (N), inclusive, of this order; and on or before March 15 of each year thereafter the entries required by Paragraph (H) of this order until the entire amount in Account 100.5 has been disposed of;”

Pacific has now complied with all the requirements of said Paragraph (O) except those pertaining to said Paragraphs (B) and (H); and this Court, by order entered herein on March 18, 1943, pursuant to stipulation between the Commission and Petitioners, has stayed the requirements of Paragraphs (B) and (H), and of Paragraph (O) as applied to Paragraphs (B) and (H), during the pendency of this review, and, in the event that said Paragraphs (B) and (H) shall not have been wholly set aside

by the judgment or decree of the Court upon this review, until ten days after the issuance and service upon Pacific of certified copy of such judgment or decree, subject to the following conditions:

“Provided, however, that during the period of the stay granted hereby, said Pacific Power & Light Company shall not declare or pay any dividends upon any shares of its common stock, or make any other distribution upon any shares of its common stock, except such dividends or distributions as might lawfully be declared, paid or made after complying with the provisions of Paragraphs (B) and (H) of said Order of said Commission, dated November 24, 1942” (R. 111-112).

(c) Description of Parties

Pacific is engaged in the public utility business in the states of Oregon and Washington, and has been so engaged since the month of July, 1910. Its properties are made up of both electric and non-electric facilities, and its electric facilities include certain transmission lines extending across the boundary line between the two states. As the owner of such transmission facilities, Pacific is a “public utility” as defined in Section 201 of the Act (16 U. S. C. A. § 824), and is therefore subject to the jurisdiction of the Commission to the extent provided by the Act. Pacific is subject to comprehensive regulation as a public utility or public service company by the states of Oregon and Washington, respectively, as to utility rates, adequacy of service, accounting, issuance of securities, contracts with affiliated interests, and every other important aspect of its business that concerns the general public. As a subsidiary of a registered public utility holding company (American), Pacific is also subject to the jurisdiction of the Securities and Exchange Commission to the extent provided by the Public Utility Holding Company Act of 1935 (15 U. S. C. A. §§ 79, et seq.).

American is a public utility holding company, registered as such under the Public Utility Holding Company Act of 1935. It owns 1,000,000 shares of the no-par value

common stock of Pacific, having a stated value on the books of Pacific of \$7.00 per share, being all of said common stock issued and outstanding. American acquired said common stock as the result of certain transactions between American and Pacific in the years 1910, 1915, and 1930, whereby American caused to be transferred to Pacific certain properties, securities, and cash, receiving in return therefor securities issued by Pacific, which included certain bonds and certain shares of preferred stock of Pacific, which were sold by American to the public as contemplated at the time American received such securities, and various issues of common stock, which were converted into said 1,000,000 shares of no-par value common stock as a part of Pacific's 1930 transactions with American and Pacific's refinancing at that time. American was permitted to intervene in the proceeding before the Commission by order dated September 16, 1941 (R. 10-11), and actively participated in the hearing therein.

The Commission is the administrative agency entrusted with the administration of the Act. It is authorized by the Act, *inter alia*, to investigate and ascertain the actual legitimate cost of the property of public utilities and the fair value of such property, and to require that every public utility file a statement of the original cost of its property (Section 208; 16 U. S. C. A. § 824g), and to prescribe a uniform system of accounts to be kept by licensees and public utilities (Section 301(a); 16 U. S. C. A. § 825(a)).

Regulation of public utilities by the states in which Pacific conducts its business is vested as follows: by the State of Oregon, in the Public Utilities Commissioner of Oregon; and by the State of Washington, in the Department of Public Service of Washington. By orders of the Commission dated August 9, 1941, and September 26, 1941, these state regulatory agencies were permitted to intervene in the proceeding in which the Order was entered (R. 14-16), but neither of these agencies took an active part in the hearing in said proceeding, or offered any testimony at such hearing.

(d) Development of Pacific's Properties

During the early part of 1910 American, with keen vision and with faith in the then present and prospective efficiency and soundness of long distance transmission of electric power as a means of integrating scattered facilities for the economical development and distribution of electric power, began an investigation of the possibilities of creating a great power system in the Columbia River District of Oregon and Washington, which not only would take care of the then existing needs for power, but which would provide an adequate and dependable source of supply for existing and prospective power business in the territory (R. 182-5).

Because of the rugged terrain, the most productive part of the territory was then and is now located in very rich but narrow valleys, widely separated from the standpoint of economical long distance transmission of electric power at that time. Located in these valleys were many small communities served by local steam and small hydro-electric generating and distribution systems, which, in general, had developed from makeshift beginnings in connection with sawmills, flourmills and other enterprises of a similar nature, which were valuable going concerns in 1910, but were not, generally speaking, efficiently equipped with adequate generating and distributing facilities, from the standpoint of the art as then developed (R. Vol. III, Ex. 15, pp. 9, 10, 24-58).

This territory therefore offered an extraordinary opportunity for development and expansion through unified operation and the use of improved generating and transmission methods, particularly as valuable water power sites were available. The economical and adequate development of water power sites requires the expenditure of large sums of money in order to provide facilities capable of supplying electricity to meet present and anticipated needs in any given territory, and requires the sacrifice of an adequate rate of return on such capital during the inevitable development period. The his-

tory of the vicissitudes of the various attempts to supply the respective communities with adequate and cheap power described in Exhibit 15, pages 1 to 119 (R. Vol. III) testifies eloquently to the inability of local capital to meet the problems.

The four systems acquired by Pacific in 1910, namely, the Yakima-Pasco System, the Walla Walla-Pendleton System, The Dalles System and the Astoria System, the units of which had previously been gathered together by American, served only seventeen communities; had an installed capacity of 11,875 kw; had 388 miles of pole line; served 7,356 customers, and had gross annual electric earnings of \$592,781 (R. Vol. III, Ex. 15, p. 18). The use of current was relatively small because the supply was inadequate, the service not dependable and the cost high (R. Vol. III, Ex. 15, pp. 20-21).

Here, then, was a rich territory, the development of which was being delayed by an inadequate supply of the cheap power which could be made available through proper financing of adequate electric generating and long distance transmission facilities. It is implicit in the record and cannot be questioned that the gathering together, integrating and financing of electric power facilities of the character described was at that time the chief business of American.

The risks involved were great. Failure to secure the individual projects necessary to develop an economical integrated system meant a huge loss on investments made. Success in assembling the required projects under a single control, however, insured proper development and automatically tremendously increased the value of the combined properties. Thus, from a realistic point of view, the total of the "original cost" of each separate project was of little significance in determining the value of the assembled whole which was transferred to Pacific.

American after investigation of the opportunities and risks involved, early in 1910 and in some instances prior

thereto, not only began acquiring the units composing the four systems referred to, but also started negotiations and made initial investments in Priest Rapids, where it envisioned a hydro-electric development comparable to the present Bonneville project (R. 182-5). The plan in broad outline contemplated the improvement of the existing hydro generating facilities sufficiently to supply the combined systems, when properly integrated through transmission lines, until such time as the demand for power could be built up to justify the financing of the prospective project at Priest Rapids. The demand, however, never became sufficiently pressing to make economically feasible the completion of the Priest Rapids development prior to the projection of the Government's plans for developing the Bonneville and Grand Coulee power sites, although expenditures actually made in promoting Priest Rapids to date amount to approximately \$4,000,000, without accumulated interest thereon (R. 185).

The development, unification and integration, to the extent feasible, of the systems and the improvement of the generating facilities, mainly through development of the hydro-electric sites, were carried out according to plan. By December 31, 1936 the generating capacity of the system had been increased from 11,875 kw. to 30,567 kw., the miles of pole lines for transmission and distribution from 388 to 3,748, the number of electric consumers from 7,356 to 57,439 (not including customers connected with the properties leased to Northwestern Electric Company), and, the gross annual electric earnings from \$592,781 to \$4,394,429 (excluding revenues from properties leased to Northwestern Electric Company) (R. Vol. III, Ex. 15, p. 18). The rates for residential service in Yakima, Washington, for example, had been reduced from \$2.25 for 15 kw. hours prior to July 1, 1910 to \$1. for 15 kw. hours on March 1, 1939 and from \$30.25 for 250 kw. hours prior to July 1, 1910 to \$7.10 for 250 kw. hours on March 1, 1939. In general these rate reductions are typical of the rate decreases in all communities served by

Pacific (R. Vol. III, Ex. 15, p. 21). Generally speaking, the average annual consumption of electricity per customer has likewise risen from less than 500 kw. hours to approximately 2500 kw. hours, which is almost double the national average (R. Vol. III, Ex. 15, p. 20).

These facts significantly demonstrate the accuracy with which the directors of both American and Pacific appraised the value of the businesses and properties which were transferred to Pacific in July of 1910 as the nucleus for the great integrated power system which now occupies the territory served by Pacific.

Although the complete integration of the whole Columbia River District through the development of Priest Rapids, as contemplated by American has been interrupted by the activities of the Federal Government in the district (R. 184), the success of the Pacific project following the common ownership and integration of the individual projects is the best possible proof of the inherent values present in the business and properties under a common ownership.

(e) Nature of Proceeding before Commission

The Commission, by its order Number 42, adopted June 16, 1936, as amended, prescribed its "Uniform System of Accounts" for public utilities and licensees. Said System of Accounts, as supplemented by the Commission's order of May 11, 1937, directed (by Electric Plant Accounts Instruction 2-D) all public utilities, including Pacific, to reclassify their electric plant accounts, and to submit to the Commission certain statements showing pro forma reclassifications of their electric plant accounts in accordance with the provisions of said System of Accounts.

Said System of Accounts, and the reclassification of accounts so directed by said Instruction 2-D and by the Commission's said order of May 11, 1937, provide for showing cost of utility plant or property upon the so-called "original cost" basis, such "original cost" being defined in said System of Accounts as "the cost of such property to the person first devoting it to public service." Pacific's ac-

counts at all times have accurately recorded such "original cost" of all property constructed or first applied by it to public service. As has been stated, a large part of Pacific's utility property was not constructed or first so applied by it, but was purchased by Pacific, along with other properties, as assembled local operating enterprises, from prior owners thereof (there were 145 such prior owners—see R. Vol. III, Exhibit 15, pp. 1-115); and, in the majority of cases, the books and records of such prior owners with respect to such property were either not available to Pacific, or, if available in whole or in part, were not adequate or acceptable records of such "original cost".

After certain preliminary proceedings before the Commission, followed by the filing by Pacific on July 3, 1940, of a tentative reclassification of its electric plant accounts in response to said order of May 11, 1937, and later by the filing with the Commission of a so-called "joint report" by the staffs of the Commission and the Public Utilities Commissioner of Oregon (R. Vol. III, Ex. 16), the Commission entered an order on July 1, 1941, requiring Pacific, among other things, to show cause why Pacific should not make the accounting adjustments proposed in such joint report, and further requiring Pacific to submit appropriate plans for the "disposition" of such amounts as might be established in so-called "Account 100.5, Electric Plant Acquisition Adjustments", and so-called "Account 107, Electric Plant Adjustments" (R. 1-5).

On September 26, 1941, Pacific completed and delivered to the Commission copies of its revised reclassification of its electric plant accounts, and of its further and revised original cost studies upon which said revised reclassification was based; and such revised reclassification statements and original cost studies (R. Vol. III, Ex. 17), together with said joint report of the staffs of the Commission and the Oregon Commissioner, were presented at the hearing held by the Commission at Portland, Oregon, from September 29, 1941 to October 8, 1941.

In the course of this hearing or shortly thereafter, all disputes between the Commission's accounting staff and Pa-

cific as to the correct figures or amounts of specific items were reconciled, and any prior differences were eliminated; and, prior to December 31, 1942, full agreement was reached with respect to the accounting treatment of all items under consideration, except only as to the treatment to be given to the items and amounts specified in Paragraphs (A), (B) and (H) of the Order of November 24, 1942. Appropriate accounting entries reflecting such agreement were made in Pacific's books, some late in 1941, and others in 1942 after Pacific's receipt of copy of the Order (R. 83-89). The entry required by Paragraph (A) of the Order was made in July of 1943, after Pacific concluded to withdraw its objections to said Paragraph (A).

At the hearing petitioners offered to prove that the reconstruction cost new, less accrued depreciation, of the properties of Pacific as of December 31, 1940, the last year-end prior to the hearing, was \$34,750,000 including \$3,000,000 of going concern value, and that at the time of the hearing such reconstruction cost new, less depreciation, of the properties of Pacific was not lower, but, if anything, higher than on December 31, 1940. The Commission, however, refused to admit this evidence on the ground that "the fair value * * * has no bearing at all in the proceeding" (R. 202-208).

Paragraph (B) of the Order directs Pacific to "dispose of" the amount of \$4,121,981.41, now classified in Account 107 in compliance with said Paragraph (A). As stated in effect in the Commission's "Opinion No. 84" (R. 41), it is not disputed that the assets transferred by American to Pacific in 1910, 1915, and 1930 (p. 5 *supra*), cost Pacific in par or principal amount of its securities, this amount of \$4,121,981.41 in excess of their actual cash cost to American, excluding from consideration the approximately \$4,000,000 of cost which American incurred upon the proposed Priest Rapids power development on the Columbia River, in furtherance and for the benefit of the enterprise transferred by it to Pacific in 1910 (R. 182-185). What Petitioners do dispute, and what they emphatically deny, is the existence of any right or authority in the Commission to require Pa-

cific to "dispose of" this \$4,121,981.41 in the manner directed by said Paragraph (B), or in any other manner, so long as the acquired assembled enterprise in connection with which this cost was incurred remains the property of Pacific, and so long as the fair value of the properties employed therein is equal to or greater than this amount, plus the amount of the so-called "system cost" or cost to American thereof.

Paragraph (H) of the Order directs Pacific also to "dispose of" the amount of \$2,741,591.66, now classified in Account 100.5, Electric Plant Acquisition Adjustments. This \$2,741,591.66 represents the excess over so-called "original cost" of the cost to Pacific or to American of properties and assets acquired in transactions with former owners who were in no way affiliated or associated with either Pacific or American. There is no dispute as to either the amount or the origin of this item. As stated by Mr. Van Scoyoc of the Commission's staff in referring to this amount—

"I am dealing there with items which were bonafide payments in arms-length transactions above original cost * * * as amounts legitimately invested in the business" (R. 504).

Again, what Petitioners do dispute, and what they emphatically deny, is the existence of any right or authority in the Commission to require Pacific to "dispose of" this \$2,741,591.66 "legitimately invested in the business", so long as the investment made at this cost remains the property of Pacific, and so long as the fair value of the assets, in the acquisition of which this "arm's length" cost was incurred, is equal to or greater than this amount, plus the so-called "original cost" of such assets.

Questions Involved

The questions presented by this review are:

- I. Although the petitioner, Pacific, as above indicated, has voluntarily made certain entries suggested by

the Commission on its fundamental books of account, the question arises as to whether or not said petitioner must involuntarily make the disposition here ordered of the items recorded in Account Nos. 100.5 and 107 and record the same in its fundamental books of account rather than merely in a separate system of memorandum accounts for the information of the Commission, in view of the opinion of this Court dated February 13, 1942 in the case of *Northwestern Electric Co. v. Federal Power Comm.*, 125 F. (2d) 882, which stated:

“Petitioner may keep such other accounts as it desires. The present regulation only requires a particular system of accounts to be kept, not that other systems shall not be kept.”

(However, compare the decision of this Court in *Northwestern Electric Electric Co. v. Federal Power Commission*, 134 F. (2d) 740, which cannot be given effect unless the order be deemed to govern the company's fundamental books of account.)

II. Has the Commission authority, by a retroactive application of its rules, which ignores all questions of value, of legality and of cost entering into a transaction at the time of its occurrence and according to the jurisdiction to which it was then subject, to require the elimination from public utility accounts of asset items lawfully established in such accounts long prior to the time the Commission was granted any authority with respect to such accounts?

III. Has the Commission authority to require Pacific to “dispose of” any amount now recorded in its asset accounts (in either Account 100.5 or Account 107), without proof that any part of the related asset values have been lost, when Pacific's asset accounts are fully supported by the present fair value of Pacific's assets, even though in excess of the Commission's determination of “original cost” as defined by it?

- IV. Has the Commission acted lawfully, in refusing to permit the introduction of or to consider competent and properly proffered evidence on the issue of "disposition", which fully establishes that the fair value of Pacific's assets is equal to or greater than the recorded book value of such assets?
- V. Has the Commission authority to require Pacific to dispose of the amount of \$2,741,591.66 in Account 100.5, Electric Plant Acquisition Adjustments, by annual charges to income or otherwise, when said amount represents admitted actual cost and investment in utility assets, incurred in arm's length transactions between non-affiliated parties, so long as the assets purchased at such cost remain the property of Pacific?
- VI. Has the Commission authority to deprive Pacific of the right to declare and pay, and its stockholders, preferred and common, of the right to receive, dividends lawfully earned upon Pacific's preferred and common stocks, to the extent that the "disposition" of the amount of \$2,741,591.66 in Pacific's Account 100.5, at the rate of \$274,159.17 per year for ten years, will necessarily divert lawful earnings and render them unavailable for the declaration and payment of such dividends and to the extent that the ordered "disposition" of the \$4,121,981.41 will diminish or wipe out Pacific's surplus, which is fully supported by the fair value of its assets, and presently available for dividends?
- VII. Has the Commission authority to require Pacific so to readjust its books and accounts as to record its assets on such books and accounts at less than their actual cost and their present fair value?
- VIII. Is Section 301 (a) of the Act (16 U. S. C. A. § 825(a), if construed as authorizing the Commission to order Pacific to "dispose of" the amount of \$4,121,981.41 in Account 107, and the further amount of

\$2,741,591.66 in Account 100.5, as provided by Paragraphs (B) and (H) of the Order, a valid and constitutional enactment; or does the section as so construed violate the due process clause of Article V of the Amendments to the Constitution of the United States, or contravene Articles IX and X of said Amendments, or assume to confer judicial powers upon the Commission in violation of Article III of said Constitution?

Specification of Errors

(1) The Commission erred, as to Paragraph (B), in ordering Pacific to "dispose of" said amount of \$4,121,981.41 of acquisition cost reclassified in Account 107 for the reason that the Commission has no authority under the Act, or under the Constitution of the United States, to require the elimination from the asset side of the balance sheet of a public utility of any sum fully supported by the present fair value of its assets, even though in excess of the Commission's determination of "original" or other cost.

(2) The Commission erred, as to said Paragraph (B), in assuming that its authority under the Act extends retroactively to the elimination from the accounts of a public utility of asset items lawfully established in the accounts of such public utility long prior to the time when the Commission was granted any authority with respect to the accounts of such utility.

(3) The Commission erred, as to said Paragraph (B), in ignoring, and in refusing to permit the introduction of, competent, relevant, and properly proffered evidence on the issue of disposition, which fully establishes that the fair value of Pacific's assets is equal to or in excess of the recorded book value thereof, and in sustaining Respondent's objection that such evidence is "immaterial and irrelevant" (R. 203).

(4) The Commission erred, as to said Paragraph (B), and violated the vested property and constitutional rights

of Pacific and its stockholders, preferred and common, by directing in effect the elimination in whole or in part of Pacific's Earned Surplus created from lawfully earned income, the effect of which elimination would be to prevent the declaration or payment of dividends lawfully earned upon the capital stock of Pacific, and without regard or consideration for the value of Pacific's assets at the time of such elimination.

(5) The Commission erred, as to Paragraph (H), for the reasons hereinabove set forth under paragraphs (1), (2), (3), and (4).

(6) The Commission erred, as to said Paragraph (H), because the \$2,741,591.66 in Pacific's Account 100.5 ordered by the Commission to be disposed of by amortization in ten equal annual charges to or deductions from income, represents admitted actual cost of and investment in Pacific's present assets, whether or not such assets be characterized as "intangible" assets; and said \$2,741,591.66 of admitted actual cost and investment may not lawfully be required to be "written off" or disposed of, so long as the assets purchased at such cost remain the property of Pacific.

(7) The Commission erred, as to said Paragraph (H), because to require such amortization of said \$2,741,591.66 of admitted actual cost and investment in Pacific's assets, would unlawfully and unconstitutionally deprive Pacific of the right to declare and pay, and its stockholders, preferred and common, of the right to receive, dividends lawfully earned upon Pacific's preferred and common stocks, to the extent that such amortization at the rate of \$274,159.17 per year for ten years, beginning with the year 1942, will necessarily divert such lawful earnings to such other arbitrarily and unlawfully prescribed purpose. Even if it were conceded that the Commission has authority to require amortization of such amount, nevertheless the Commission erred in ordering such amortization through Account 537 rather than Account 505.

(8) The Commission erred, as to said Paragraphs (B) and (H), because the Commission, in issuing such orders, has exceeded the scope of its regulatory authority over Pacific under the Act, has contravened the Fifth and Tenth Amendments of the Constitution, and Sections 1 and 2 of Article III of the Constitution, and has infringed upon the regulatory authority reserved to the States by said Act and the Tenth Amendment to the Constitution.

(9) The Commission erred, as to said Paragraphs (B) and (H), by requiring Pacific to record its assets on its books at less than their present fair value.

(10) The Commission erred, as to Paragraphs (B) and (H), in failing to find that the amounts on the books of Pacific are fully covered and represented by assets having a value in excess of such amounts, and the Commission further erred in ordering the disposition of any part of the difference between original cost and the cost recorded on the books of Pacific, as required by Paragraphs (B) and (H) of said Order, because such failure to find and such portions of its Order are arbitrary and capricious, violate the Fifth and Tenth Amendments to the Constitution, constitute the taking of property for a public purpose without payment of just compensation, are contrary to the provisions of Sections 1 and 2 of Article III of the Constitution, and violate the constitutional guarantees of due process and of the judicial determination of fundamental questions of fact and law.

Summary of Argument

This Court, in the case of *Northwestern Electric Company v. Federal Power Commission*, 125 F. (2d) 882, held that the Commission's system of accounts is one that a reasonable man could believe was warranted, because "original cost", "while it is not the only factor" in the fixing of rates, is a "factor to be considered". Having reached that conclusion on the premise stated, and the further premise that the system provides a means to "show correctly one of

the factors in fixing rates", the Court held that "the judicial function is exhausted" so far as concerns the validity of the Commission's system of accounts. In so holding, the Court also declared,

"Petitioner has as much property as it has ever had. The system of accounts takes nothing from petitioner" (*id.* pp. 886-7).

As stated on page 2 *supra*, Petitioners have withdrawn their objections on this review to Paragraph (A) of the Order, Petitioner assuming the validity of the Court's declaration that the attachment of special labels to particular items in Pacific's accounts, in order to differentiate such items from "original cost", of itself "takes nothing from petitioner". The Commission's Order, however, now seeks to employ such *labels* as devices to compel Pacific to make further entries in its books, which would state in effect—"Pacific has \$4,121,981.41 less property than it previously had, and its property will diminish at the further rate of \$274,149.17 each year for the next ten years"—solely because of the issuance of this Order. No realistic person may contend that such Order "takes nothing" from petitioner, or even that "petitioner has as much property as it has ever had", assuming the term "property" includes the rights which normally flow from corporate ownership of tangible and intangible assets.

If Pacific has as much property as it ever had, there can be no basis, in law or in morals, for the Commission's requiring Pacific to "dispose of" the items referred to in Paragraphs (B) and (H), by making entries in its books*

* It is assumed in view of the phraseology of the Commission's Order (R. 61-4) and in view of the provisions of the order staying proceedings pending determination of this review (R. 110-12), that the Commission deems its Order to be applicable to the fundamental books of account of Pacific. The arguments made in this brief are therefore based upon that assumption. However petitioners believe that the same arguments would apply, with perhaps some difference of degree and effect and from a somewhat different point of view, if the order is deemed to apply only to a set of memorandum accounts for the information of the Commission. Petitioners therefore respectfully reserve the right to argue the applicability of the contentions made herein if the position of the Commission is clarified to show that the entries directed in the Commission's Order are required to be made only on a memorandum set of books for the information of the Commission.

and published balance sheets showing that Pacific's assets have been reduced by \$6,863,573.07, as compared with the situation before the Order was issued, unless the Commission had the power to determine, and had lawfully determined, that such amount of assets was non-existent or had disappeared. The Commission made no such determination, and rejected, as irrelevant on the "disposition" issue, all evidence proffered by Petitioners to demonstrate the existence of assets to cover the full amount of the items so to be disposed of, plus all other amounts recorded in its asset accounts.

Thus, the Commission goes beyond the function of prescribing accounting *labels*, and assumes the further authority to "dispose of" costs and values lawfully recorded on Pacific's books of account (in 1910 and 1930), many years prior to the granting of accounting jurisdiction to the Commission (1935). In so doing, the Commission assumes authority not purported to be vested in it by the Act, and authority which the Act could not lawfully vest in the Commission, because any attempt so to do would violate the Fifth and Tenth Amendments, as well as Article III, of the Constitution of the United States.

ARGUMENT

POINT I

In ordering the disposition of the \$2,741,591.66 classified in Account 100.5, Electric Plant Acquisition Adjustments, by charging the same against income in ten equal annual charges, the Commission is violating the constitutional rights of the Petitioners.

The Commission in Paragraph (H) of its Order of November 24, 1942, has directed that Pacific dispose of the amount of \$2,741,591.66 classified in Account 100.5, Electric Plant Acquisition Adjustments, by charging said amount to Account 537, Miscellaneous Amortization, in ten equal annual charges, commencing with the calendar year 1942. This item of \$2,741,591.66 represents the difference between the original cost of Pacific's utilities properties

to the person first devoting them to public service and the amount paid for those properties when they were first purchased either by Pacific or by American prior to their transfer by American to Pacific. There is no question but that the amounts paid for these properties were bona fide payments in arm's length transactions above original cost (R. 504). The Commission does not challenge these amounts as legitimate items of cost to the accounting utility.*

The position of the Commission and its staff members, however, is that substantially all of this excess above original cost represents payments for "intangibles", and that the cost of "intangibles" should not be permitted to remain on the books (R. 49, 495-6, 530-3), although it is conceded that the sum represents bona fide payments made in arm's length transactions; that it was legitimately invested in the business; that it represented legitimate expenditures chargeable to plant account at the time they were made and that a portion thereof is applicable to physical values (R. 492-3, 504, 512).

The sole basis for the Commission's order of amortization of this sum rests upon the opinion of two of its staff members to the effect that this sum represents an intangible item which has no permanent place in the accounts of a public utility because, first, intangibles *tend to disappear* and under proper accounting treatment should be written off and, second, intangibles have no value for rate-making or security purposes.

(a)

The opinion testimony of the Commission's staff experts, as to the disappearing nature of the \$2,741,591.66 and the need for its amortization, is not supported by the facts in the record or by sound accounting principles.

In the opinion of the members of the Commission's staff any sum in excess of "original cost" must repre-

* The question of disposition presented here, therefore, is altogether different from the question before this Court in *Northwestern Electric Co. v. Federal Power Commission*, 134 F. (2d) 740, where it was decided that the Commission properly ordered the amortization of an item of \$3,500,000 found by the Commission to be a mere "writeup."

sent an intangible consisting of good will, going value, franchise value, monopoly value, nuisance value, etc., which are rooted in prospective earning power and merge and blend into one when considering the utility business (R. 530-1). To compare the values inherent in the difference between "original cost" and the amount paid by American for the various projects turned over to Pacific in 1910 as a unified whole with such intangible values as patents, franchises, etc., having a limited life, is an unfair attempt to disparage the incremental values which arose through the acquisition in a common ownership of the various projects, and which were inherent in the location of the projects and businesses, subject only to their unification and integration. Such difference in cost is actually represented by the tangible properties so acquired and as they are now integrated and in operation. Regardless of whether or not the different types of intangibles listed by members of the Commission's staff tend to merge into one intangible, there can be no question that the so-called intangible, here under consideration, has become inseparably merged into the tangible values of the projects assembled by American and transferred to Pacific. Intangibles of this nature cannot disappear because they were and are rooted in the potentialities and possibilities of the businesses and properties which constituted the assembled system, unified and developed to meet the needs and desires for electric energy in a service area favorably located in respect to both the potential needs of the territory and the available means for producing such electric energy by water power.

The value of such intangibles increases rather than diminishes so long as electric energy continues to perform its peculiar function better than any other type of energy and the business of generating and distributing such energy continues to be successful. The so-called intangible values inherent in this business, conducted in a rapidly growing agricultural and industrial territory, cannot disappear. Certainly in such a territory and under the circumstances here prevailing it would be preposterous

to assume, for instance, that the peculiar physical advantages inherent in Pacific's water power sites will disappear so long as the force of gravity continues to constitute one of the great cheap sources of energy and so long as the demand for the energy so produced continues to exist.

Such values do not disappear—they merely lose their identity by fusion with the system and situation of which they have become inseparable parts. They are not “intangibles” which tend to disappear, in the sense of depreciating or losing their value, except as the tangible values of which they are an integral part depreciate.

The clear distinction, from the standpoint of depreciation, between such items of value and intangibles having specific and limited lives such as patents, copyrights, and term franchises, is recognized and applied in the federal income tax law and regulations.

The United States Treasury Regulations provide:

“REG. 103, SEC. 19.23 (1)—3. *Depreciation of intangible property.* —Intangibles, the use of which in the trade or business is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses, and franchises. Intangibles, the use of which in the business or trade is not so limited, will not usually be a proper subject of such an allowance. If, however, an intangible asset acquired through capital outlay is known from experience to be of value in the business for only a limited period, the length of which can be estimated from experience with reasonable certainty, such intangible asset may be the subject of a depreciation allowance, provided the facts are fully shown in the return or prior thereto to the satisfaction of the Commissioner. No deduction for depreciation, including obsolescence, is allowable in respect of good will.”

To illustrate further, “organization expense” normally does not buy any items of physical equipment and is therefore classed as an intangible, yet, except in cases where the corporation has a specifically limited life by its charter, such expenses are not subject to amortization or

depreciation for income tax purposes. (*Logan-Gregg Hardware Co.*, 2 B. T. A. 647; *First National Bank of St. Louis*, 3 B. T. A. 807; *Emerson Electric Manufacturing Co.*, 3 B. T. A. 932; *American Colortype Co.*, 10 B. T. A. 1276. To the same effect, see *Simmons Co. v. Commissioner*, 33 F. (2d) 75; *Corning Glass Works v. Lucas*, 37 F. (2d) 798; and *International Textbook Co. v. U. S.*, 44 F. (2d) 254.)

The accounting authorities cited by the Commission in its opinion to bolster the opinion testimony of its experts (R. 50) afford no basis for the Commission's action. The Commission quotes from "A Statement of Accounting Principles" (1938), Sanders, Hatfield and Moore (published by American Institute of Accountants), the following paragraph:

"The writing off of such intangible assets as good will evokes scarcely any protest, even when it is recognized that substantial good will exists. The general distrust of good will and the knowledge that it has been widely used to capitalize exaggerated expectations of future earnings leave an almost universal feeling that the balance sheet looks stronger without it. When actual consideration has been paid for good will, it should appear on the company's balance sheet long enough to create a record of the fact in the history of the company as presented in a series of its annual reports. After that, nobody seems to regret its disappearance when accomplished by methods which fully disclose the circumstances."

A careful reading of the quotation indicates that the authors are *excusing* the write-off of intangibles as a permissible exception to strict accounting principles in the interest of conservatism and in order to produce a balance sheet which "looks stronger". It should be noted that the authors insist that intangibles should in no event be written off until they have appeared long enough to create a record of the fact that they have been purchased and that thereafter they may be written off only if there is full disclosure of the circumstances.

That the writing off of amounts paid for intangibles is a principle of conservatism rather than accounting is further evident from the following language from the aforementioned "A Statement of Accounting Principles" (p. 12) which introduces the portion quoted by Commission counsel:

"There is a prevalent impression that, while overstatement of assets or earnings is a major fault, understatement is less objectionable, and may be a positive virtue. It will be agreed at once that deliberate misstatement in either direction is not to be condoned; but when as frequently occurs, the demand is made for 'accurate statement,' the subject may not be thus simply dismissed. 'Accurate statement' in a literal sense is not possible; reasonable judgment must enter into many of the items shown in the statements. In most of the cases where understatement is alleged, the makers of the statements assert that they reflect the more essential truth, and that the difference is solely in the point of view. It is therefore proper to inquire into the circumstances which have led to any bias which may exist in favor of understatement, to observe the principal forms which understatement is apt to take, and to appraise the consequences of each.

* * * * *

"The common belief that less mischief is done by understatement than by overstatement is, in the hands of honest men, probably true; but with dishonest men understatement may serve their turn as well as overstatement."

Furthermore on pages 68 and 69 of the same work, the authors discuss the writing off of intangibles at some length as follows:

"There is marked difference of opinion and practice as to whether or not goodwill should be written off, and if so, by what steps. *It is clear that goodwill itself suffers no actual decline as long as the earning power of the company remains unimpaired,* but the pervasive feeling that the showing of goodwill does not add to the strength of the balance-sheet has led to much writing off, usually in a few large amounts

rather than by systematic amortization. As a result, a considerable number of important companies now show goodwill at \$1, and others at no value. Distrust of the goodwill item, so far as it exists, probably arose more from excessive valuations in the past than from question as to the reality of the item. A smaller number of companies show goodwill reduced by a reserve or allowance, but still at substantial amounts.

“To summarize:

“(1) Goodwill, like other assets, should be shown at its bona fide cost to the owner.

“(2) To attribute to goodwill an excessive value based on the par value of stock issued therefor or otherwise, is not good accounting.

“(3) *If there is no longer valuable goodwill, or if its value has been obviously impaired*, it should be written down. The resulting charge should be against capital or surplus, not against income.

“(4) The regular amortization of goodwill is *not considered imperative*, as is the amortization of wasting assets. Such a treatment, however, is not considered objectionable. Strictly speaking, the amortization is a charge against income for the period during which the goodwill is supposedly effective, but the practice of charging capital or surplus instead of current income is approved by accountants.” (Italics supplied.)

From the above quotations, it appears that Commission counsel are leaning on a slender reed when they rely on principles of accounting as requiring the write-off of intangibles.

To hold as the Commission does (R. 49), that this sum of “\$2,741,591.66 represents payment for intangibles” which “have questionable continuing value” and should be rapidly amortized, when the total tangible assets of Pacific into which the values represented by this sum have become inseparably merged, are conservatively valued in dollars greatly in excess of this sum plus the “original cost” of such assets, is to permit the glib but unsupported

opinion of the staff's experts to prevail over fact and common sense. The testimony of the Commission's witnesses ignores the reality of intangible values—values which are present in every successful enterprise and, where related to the integration of utility properties, to the efficiency of the system thus created and to the economy of its operations, are inseparable from the physical property and its use.

For the Commission to require that asset values, representing admitted legitimate cost, be written off the books of Pacific on the basis of mere opinion testimony that good accounting requires such disposition (R. 531), which is unsupported by accounting authorities and contradicted by the affirmative evidence of present value proffered by Pacific, is to deprive Pacific and American of property without due process of law, in violation of the rights guaranteed by Article V of the Amendments to the United States Constitution. Congress certainly could not within its constitutional powers pass a valid act requiring that all intangible values recorded on the books of every public utility under its jurisdiction must be written off without consideration of any evidence as to the disappearance of their value. The Commission certainly has no greater power than Congress.

(b)

The opinion testimony of the Commission's staff experts as to the impropriety of including the \$2,741,591.66 in the rate base is not supported by any factual evidence or any accounting or legal principle applicable to the issues here involved.

Despite the tangible nature of the value under consideration, due to its inextricable merger into the tangible assets purchased, both the Commission and its staff members further argue that it should be eliminated from Pacific's accounts because it "may have no value whatever for the purposes of rate making or for security purposes" (R. 531-532). Although this sum of \$2,741,591.66 is recognized as a legitimate investment (a legitimate cost to Pacific as defined in the System of Accounts) and although the record is

barren of any evidence that the value inherent therein has disappeared, (the evidence being merely that intangible values *tend to disappear*), the Commission has ordered it amortized in ten equal installments through Account 537, thereby making it a charge against net income rather than a charge against operating expense to be absorbed by the rate payer for which provision is specifically made in Account 505 (R. 512-514). This treatment of the item was ordered by the Commission on the thesis of one of its staff members to the effect that the item should not be absorbed by the rate payer, though it be conceded that the item represents a legitimate investment (cost) to Pacific, that it is fully covered by the fair value of its tangible property and that it might receive a different treatment in a rate case before another agency (R. 508-511), simply because in his opinion it should not be considered in the rate base (R. 515).

That it would receive a different treatment by the Supreme Courts of Oregon and Washington, which states have jurisdiction over Pacific's rate base, is evident from the following decisions:

Pacific Telephone & Telegraph Co. v. Wallace, 158 Ore. 210, 75 Pac. (2d) 942 at p. 950;

State v. Department of Public Works of Washington, 184 Wash. 451, 51 Pac. (2d) 610.

It may be that a separate allowance for intangibles or going concern value need not be made in establishing a rate base, but neither the Act nor the Commission's account regulations can constitutionally require the elimination from the rate base of amounts paid for property in excess of original cost where such items are supported by the present fair value of the property assembled as a whole.

Smythe v. Ames, 169 U. S. 466;

Driscoll v. Edison Co., 307 U. S. 104;

Fed. Power Comm. v. Nat. Gas Pipeline Co., 315 U. S. 575.

It is significant that the Commission either regards rate determination with respect to Pacific as within its province or else regards its system of accounts as the exclusive sys-

tem of accounts to be kept by Pacific for all purposes, including state regulation of rates. Clearly the Commission has no rate making jurisdiction over Pacific, for all of its rates are subject to regulation by the State of Washington or the State of Oregon. Section 201(a) of the Act (16 U. S. C. A. § 824(a)) expressly limits the jurisdiction of the Commission to "those matters which are not subject to regulation by the States". Furthermore rate making is an evaluation function requiring the exercise of judgment and is vested in management and in government commissions only when they are specifically granted such jurisdiction—never in accountants. Rates are never determined solely through the agency of an accounting system.

However, if it is desirable that the values established in accounts and in the rate base be brought more closely together, the Commission may not order the elimination from the accounts by amortization or otherwise of existing values which have neither disappeared or been lost. Neither may it use the pretext of segregating and pocketing individual items of physical assets according to its own peculiar definition of cost, without regard to existing aggregate values heretofore legally and properly recorded on the books, for the purpose of building up out of the residue a composite item to be arbitrarily labeled intangibles or write-up and disposed of on that basis, if the total asset value of the enterprise as a unit is sufficient to cover dollar for dollar the recorded book value of the enterprise. The patent illegality and impropriety of such procedure is pointed when, as here, the composite item represents conceded items of cost to Pacific recorded on its books as an investment many years before the passage of the Act. In short the Commission has "no power to compel a corporation to write off from its book value a loss which it has not sustained, or to give up a part of its constitutional rights."

New York Edison Co. v. Maltbie, 244 App. Div. 685, aff'd, 271 N. Y. 103.

In other words the Commission may not, for accounting purposes, order the elimination of book values by

building up such a composite item on rate base principles without accepting all the fundamental principles applicable to the establishment of a rate base.. If items already on the books are to be eliminated on rate base principles rather than on principles of accounting, a consistent approach would require the full application of rate base principles to the problem and the consequent retention on the books of the company of all book values fully supported by the present value of its assets devoted to the public service.

Assuming that it is important and desirable that a system of accounts supply useful information for rate proceedings, *it is absolutely essential*, in order that the Act authorizing the establishment of such a system and the system itself may survive a charge of constitutional invalidity, (a) that the accounting corporation (Pacific in this case) be permitted to retain on its fundamental books of account all items of value which it is entitled to have considered under established principles of rate regulation, particularly with respect to matters recorded long before the effective date of the Act, and (b) that its fundamental books of account, if the Commission purports to exercise jurisdiction with respect thereto and not merely over a memorandum system of records for its own use and information, be permitted to serve other useful and essential purposes in the conduct of its business.

In the words of the Court in *N. Y. Edison Co. v. Maltbie*, 244 App. Div. 685, aff'd, 271 N. Y. 103,

“* * * The books of a utility corporation are not kept solely for the information or benefit of the Commissioner; * * * stockholders, bond owners, the investing public and rate payers are interested; also * * * corporate financing is done upon the basis of book values (Norfolk & Western R. Co. v. U. S., 52 F. (2d) 967).”

It follows from this that the propriety of retaining items in the accounts of a utility or of writing them off is not governed solely by whether such items are proper components of the rate base. For example property owned by

a utility corporation which is not used or useful in the rendition of the public service is not included in the rate base. Yet clearly, such property, as long as it is owned by the utility, must appear as an asset on the utility's accounts.

While purporting to be interested only in establishing and administering an accounting system based on established accounting principles, the Commission is in reality ordering the elimination of this item by an improper and partial application of principles relating to the establishment of a rate base, which, for all practical purposes accomplishes a quasi-reorganization of Pacific without consideration of the fundamental standards of value applicable both to reorganizations and to the establishment of a rate base. As to reorganizations, see:

- Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, and cases there cited;
- National Surety Co. v. Coriell*, 289 U. S. 426, 436;
- Finletter*, *The Law of Bankruptcy Reorganization* (1939) 557-560;
- Craven and Fuller*, *The 1935 Amendments of the Railroad Bankruptcy Law*, 49 *Harvard Law Review*, 1254, 1272-1274;
- Bonbright*, *Valuation of Property* (1937) 884-893;
- Dewing*, *The Financial Policy of Corporations* (1941), Vol. II, pages 1373-1376;
- In the Matter of Utilities Power & Light Corp.*, 5 SEC 483, 500-501.

As to rate base, see: *Smythe v. Ames* and other cases cited on p. 27, *supra*.

The illegality of the Order is emphasized by the illogical and inconsistent attitude of the Commission in eliminating the item on the basis that it has no *value* for regulatory purposes (R. 533-49), and by summarily approving the exclusion of the proffered evidence of value on the theory that "*cost not value* is the fundamental basis for accounting for public utility plant" (R. 47).

Hence, in so far as the Commission based its Order for the amortization of the \$2,741,591.66 on the opinion of its staff experts as to the impropriety of the inclusion of that item in the rate base, without consideration of Petitioners' proffered proof of value, its order is grounded on inconsistent theories and is not supported by any substantial factual evidence or any accounting or legal principles relevant to the issues. To sustain such an order is to deprive the petitioners of the due process of law which they are guaranteed by the United States Constitution.

(c)

The writing off of asset items in excess of original cost, where fully supported by present fair value, has been properly condemned as unconstitutional by the courts.

While it is perhaps true, as was stated in *Northwestern Electric Company v. Federal Power Commission*, 125 Fed. (2d) 882 (C. C. A. 9th, 1942) at p. 886, that the petitioners are deprived of nothing by a mere segregation of asset items into original cost and amounts in excess thereof, both Pacific and American suffer a real detriment when by the arbitrary order of the Commission, earnings or surplus which would otherwise be available for the payment of dividends are used for the needless writing off of the cost of assets having a current existence and value.

The action of the Commission in thus ordering the disposition of the cost to Pacific of its assets in excess of the original cost of such assets to the person first devoting them to public service, without consideration of proffered evidence of the present value of such assets, is a clear violation of the rule laid down by the United States Supreme Court in *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232 (1936).

There was under consideration in that case the validity of a system of accounts promulgated by the Federal Communications Commission, which contained a Plant Acquisition Adjustment Account similar to Account 100.5 in the system of accounts here under consideration. The Court

upheld the system only on the representation of the Federal Communications Commission that it was not the intention of the Commission in promulgating the system of accounts to require a mandatory or arbitrary write off of amounts classified in the Plant Acquisition Account. To the argument of the Telephone Company that sub-division (C) of the Acquisition Account there under consideration, providing that "the amounts recorded in this account with respect to each property acquisition shall be disposed of, written off, or provision shall be made for the amortization thereof in such manner as this Commission may direct," implied an arbitrary or mandatory write off, the Court replied:

"If subdivision (C) had the meaning thus imputed to it, *there would be force in the contention that the effect of the order is to distort in an arbitrary fashion the value of the assets.* But the imputed meaning is not the true one. The Commission is not under a duty to write off the whole or any part of the balance in 100.4, *if the difference between original and present cost is a true increment of value.* On the contrary, only such amount will be written off as appears, upon an application for appropriate directions, to be a fictitious or paper increment. This is made clear, if it might otherwise be doubtful, by administrative construction. Thus, the Commission's chief-accountant testified that by the proper interpretation of Account 100.4, amounts therein 'would be disposed of, after the character of the item had been determined, in a manner consistent with the general rules underlying the uniform system of accounts for the distribution of expenditures, according to their character, to operating expenses, income, surplus, or *remain an investment.*' Other witnesses gave testimony in substance to the same effect. But even more decisive are statements made by counsel, appearing for the Government and arguing the case before us. To avoid the chance of misunderstanding and to give adequate assurance to the companies as to the practice to be followed, we requested the Assistant Attorney-General to reduce his statements in that regard to writing in behalf of the Commission. He did this and informs us that 'the Federal Communications Commission con-

strues the provisions of Telephone Division Order No. 7-C, issued June 19, 1935, pertaining to account 100.4' as meaning 'that amounts included in account 100.4 that are deemed, after a fair consideration of all the circumstances, to represent *an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired*; and, in accordance with paragraph (C) of account 100.4, provision will be made for their amortization.'

"We accept this declaration as an administrative construction binding upon the Commission in its future dealings with the companies. *Hicklin v. Coney*, 290 U. S. 169, 175; *Addy Co. v. U. S.*, 264 U. S. 239, 245. The case in that respect is sharply distinguished from *New York Edison Co. v. Maltbie*, 244 App. Div. 685, 281 N. Y. S. 223; *id.*, 271 N. Y. 103, 2 N. E. (2d) 277, where under rules prescribed by the Public Service Commission of New York, there was an inflexible requirement that an account similar in some aspects to 100.4 be written off in its entirety out of surplus, whether the value there recorded was genuine or false. The administrative construction now affixed to the contested order devitalizes the objection that the difference between *present value* and *original cost* is withdrawn from recognition as a legitimate investment." (Emphasis added.)

It should be noted that the United States Supreme Court clearly lays down the rule that the writing off of assets which have a present value would be an objectionable infringement of the accounting utility's rights and that the difference between original and present cost shown on the company's books is not to be written off if it represents a "true increment" (i. e., a true increase) of value. The Court cites with approval the case of *New York Edison Co. v. Maltbie*, 244 App. Div. 685, *aff'd*, 271 N. Y. 103, which squarely held that a requirement of the Public Service Commission of New York that all amounts in excess of original cost be expunged from the books whether or not supported by present value, was an arbitrary exercise of power in violation of the utility's constitutional rights. The following language of the Court in the *New York Edison Co.* case is pertinent:

“* * * ‘The power vested in the Commission to prescribe uniform methods of keeping accounts and records (Publ. Serv. Law, § 66, subd. 4) does not include the power to compel a corporation to write off from its book value a loss which it has not sustained, or to give up a part of its constitutional rights. If, as has been said, “the actual cost of the property—the investment the owners have made—is a relevant fact” (*Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U. S. 287, 306), a corporation cannot be compelled to make entries upon its books calculated to conceal such relevant fact. It follows that the Commission had no power to impose such condition.’ (*People ex rel. Iroquois Gas Corp. v. Public Service Commission*, 264 N. Y. 17, 21). The foregoing was written concerning a condition which the Commission sought to impose as to the purchase of the property of one utility corporation by another. If it lacks power as to one transaction, it also lacks power to enforce by a general rule such a condition as to all similar transactions.

“* * * It may desire information to enable it to proceed against corporations which it believes have inflated entries in their fixed capital accounts through intercompany transactions, and in connection therewith, information as to original cost to the predecessor utility corporation. *It could require that these facts be recorded in an account or memorandum disconnected from the fixed capital account, and thus avoid the unconstitutional requirement that losses which had not been suffered be shown on the books.* The petitioners argue, and with high judicial authority, that the books of a utility corporation are not kept solely for the information or benefit of the Commissioner; that stockholders, bond owners, the investing public and ratepayers are interested; also that corporate financing is done upon the basis of book values. (*Norfolk & Western R. Co. v. United States*, 52 F. (2d) 967). That to be required to show a loss on the books when none has been suffered is arbitrary. Many of the fixed capital accounts ordered to be redistributed contain entries reflecting purchases from predecessor utilities that were approved by the Commissioner and other entries concerning consolidation and purchases which have been approved by courts, including the Supreme Court of the United States. These entries are not made upon the basis of ‘original cost’ as the

Commission now seeks to define it. Financing has been carried on and transactions made on the basis of these figures as to fixed capital. A requirement that a part now be charged off is confiscatory." (Emphasis supplied.)

It is therefore submitted that, on the authority of the foregoing court decisions, the Order of the Commission requiring the writing off of amounts actually expended by the accounting utilities in excess of original cost, on the mere speculation of Commission witnesses that such excess *may* represent intangible values which *may* have disappeared, and without consideration of the petitioners' proffered evidence of the present value of the assets, is unlawful and invalid in that it is arbitrary and capricious action depriving the petitioners of property without due process of law.

(d)

The recorded values on Pacific's books represent vested property rights which it is beyond the Commission's power to destroy by a retroactive application of its rules.

Long before the Federal Power Commission existed and long before original cost had become the fetish of regulatory commissions, American, in arm's-length transactions with completely unaffiliated interests, acquired the properties which it later transferred to Pacific. It paid the price mutually agreed upon by buyer and seller as the fair value of the individual properties. Admittedly, there was nothing improper about the transactions. The books of Pacific and the value of its properties have been the basis upon which Pacific's securities have been issued, its credit established and its dividends paid. Yet we now find the Commission many years later, requiring Pacific to write off its books all amounts in excess of the cost of the assets to the persons who first devoted them to public service. This is to be done, moreover, at the expense of American and the other security holders of Pacific by requiring the diversion of earnings which under corporate law and the contract between Pacific and its shareholders would be available for dividends.

The Commission neither has been nor could be granted the authority thus to destroy rights long since vested. The following language of the United States Supreme Court in *Osborn v. Nicholson*, 13 Wall. 654, pages 662-663, is pertinent:

“But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that when the thirteenth amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force. *This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities.* A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils. It would be contrary to ‘the general principles of law and reason,’ and to one of the most vital ends of government. The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. *The proposition, if carried out in this case, would, in effect, take away one man’s property and give it to another.* And the deprivation would be ‘without due process of law.’ This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the states and the nation.” (Emphasis supplied.)

This doctrine has been repeatedly enunciated by the Supreme Court. Although Congress, as an incident to

the exercise of its commerce powers, may impair contract rights, it may not confiscate property founded on contract rights vested at the time of the passage of an act purporting to grant such power, either for the benefit of the public or for one individual or group at the expense of another.

In *Lynch v. United States*, 292 U. S. 571, Mr. Justice Brandeis said, at page 579:

“*Second.* The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States v. Central Pacific R. Co.*, 118 U. S. 235, 238; *United States v. Northern Pacific Ry Co.*, 256 U. S. 51, 64, 67. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power.”

See also the case of *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56, where Mr. Justice Cardozo held that even a procedural change which unreasonably postponed judicial remedies constituted a confiscation of property.

And see also the following cases which hold that an attempt to take away rights which are vested under a prior act, by the repeal thereof or by the provisions of a further statute, constitutes confiscation:

Coombes v. Getz, 285 U. S. 434;

Forbes Pioneer Boat Line v. Board of Commissioners, 258 U. S. 338;

Ettore v. Tacoma, 228 U. S. 148;

Pacific M. S. S. Co. v. Joliffe, 2 Wall. 450.

In the case of *Louisville Joint Stock Bank v. Radford*, 295 U. S. 555, Mr. Justice Brandeis, construing the so-called Frazier-Lemke Act of June 28, 1934, held that although that Act was adopted pursuant to the broad bankruptcy powers granted to Congress under the Constitution, the power therein granted must be exercised subject to the restrictions of the Fifth Amendment and that Congress may not take for the benefit of the debtor rights in specific property acquired by the creditor prior to the date of the Act, saying at pages 589 to 590; 597; 601 to 602:

“*Fourth.* The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor’s personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. Compare *Mitchell v. Clark*, 110 U. S. 633, 643. But the effect of the Act here complained of is not the discharge of Radford’s personal obligation. It is the taking of substantive rights in specific property acquired by the Bank prior to the Act.

* * * * *

“* * * Under the Act, the purpose of the delay in making a sale and of the prolonged possession accorded the mortgagor is to promote his interests at the expense of the mortgagee.

* * * * *

“* * * The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. Compare *Ochoa v. Hernandez*, 230 U. S. 139, 161; *Loan Association v. Topeka*, 20 Wall. 655, 662, 664; *In re Dillard*, Fed. Case No. 3912, p. 706. As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation’s need, private property shall not be

thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

(e)

The Commission's order requiring the amortization of the \$2,741,591.66 is invalid because it is unauthorized by the Act and is a usurpation of the functions constitutionally reserved to the Judiciary and to the States.

The opinion and order of the Commission constitute, in effect, an adjudication that part of the common stock of Pacific is not legally paid up, since American is required to pay again for such common stock, through the diversion of earnings by charges to Account 537 for the amortization of the \$2,741,591.66 recorded in Account 100.5 This is a holding that the Commission is authorized to assume exclusive jurisdiction of, and to oust judicial and other state authority over, internal affairs of a public utility company upon which the accounting requirements of the Commission or any order assumed to be related thereto may impinge.

But the Commission is not clothed with any such comprehensive, all-inclusive judicial and regulatory power. The Act expressly negatives such intent in language that must be deemed to have been carefully chosen and which was written into the bill after the hearings had disclosed great concern lest the Act interfere unduly with local regulation and its proponents had clearly stated that its purpose was to supplement state regulation and to fill the gap indicated by *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U. S. 83. Section 201 (a) of the Act (16 U. S. C. A. § 824 (a)), expressly provides that the Commission's regulatory authority shall "*extend only to those matters which are not subject to regulation by the States.*" The reports of the Senate and House Committees on Inter-

state Commerce on the bill and the statements of Commissioner Seavey, speaking as a member of the Commission, and Dozier DeVane, General Solicitor for the Commission, in support of this legislation make it evident that the bill was conceived entirely as a supplement to and not as a substitute for state regulation. The report of the Senate Committee contains the following illustrative statement:

“Section 201—Subsection (a) contains a declaration of the necessity for Federal regulation and defines the scope of that regulation. * * * It also declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission.”

Certainly the provisions of Section 301(a) of the Act which purport to authorize the Commission to “determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited,” look to the future and not to the past (compare accounting procedure of Interstate Commerce Commission) and are not to be so construed as to make definitions and regulations issued in connection therewith determinative of legal rights regardless of consequences. Otherwise, the statutes of a state, and the decisions of its highest court interpreting the law of such a state, cannot be determinative and afford no assurance as to any contractual right or liability; all legal and equitable rules may be disregarded (in effect, discarded) and all *past* transactions, however *remote*, become subject to review and adjustment in accordance with what the Commission, in its own unfettered discretion, may consider desirable for the purposes of its future regulation. And “the security inherent in our judicial safeguards” may well be seriously impaired. *St. Joseph Stock Yards Co. v. U. S.* 298 U. S. 38, 52.

Any determination of whether Pacific is required to recognize its common stock as not fully paid is judicial in character. No provision is made for a judicial determination of this issue with its bearing on the payment of

dividends and as a result both the Act and the accounting regulations, if they be interpreted to give the Commission judicial authority to make such a determination, are void.

Crowell v. Benson, 285 U. S. 22 at pp. 56 and 57;
St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38
 at p. 51;

Chicago, Milwaukee & St. P. Ry. Co. v. Minnesota,
 134 U. S. 418, 457, 458;

Ohio Valley Water Co. v. Ben Avon Borough, 253
 U. S. 287;

Bluefield Co. v. Public Service Commission, 262
 U. S. 679.

Pacific is a Maine corporation and the courts of that state alone have authority to determine the adequacy of the consideration received upon the issuance of capital stock of corporations organized under its laws or to enforce payment of an allegedly unpaid stock subscription.

Rogers v. Guaranty Trust Co. of N. Y., 288 U. S.
 123;

Cohn v. Mishkoff Costello Co., 256 N. Y. 102;

Beasley v. Mutual Housing Co., Inc., 39 F. (2d)
 290 (App. D. C.);

Wallace v. Motor Products Corp., 25 F. (2d) 655
 (C. C. A. 6th).

The unauthorized character of the Commission's usurpation of judicial powers in this connection is emphasized by examination of the conflict which would arise in a converse situation. If the Commission is authorized to make such determinations without consideration of the law of the state of incorporation, it follows that the decree of a state court canceling stock which in its opinion had not been paid for could likewise be ignored by the Commission if the Commission's system of accounts may be administered without regard to the laws of the several states or to rights and obligations existing thereunder.

Petitioners submit that it was never intended that the Commission should have the authority which it is assert-

ing here. In any event the order of the Commission here under consideration, whether within the contemplation of the statute or not, is clearly invalid because it would take the property of these petitioners without due process of law and in violation of Article III of, and both the Fifth and Tenth Articles of the Amendments to, the Constitution of the United States.

The petitioners therefore submit that the order of the Commission requiring the amortization of the \$2,741,591.66 classified in Account 100.5 should be declared invalid and beyond the authority of the Commission because (a) it is not based on substantial evidence, (b) the opinion testimony with respect to the propriety of including this item in the rate base is unfounded in law and fact and irrelevant to the issues, (c) it was entered without consideration of proffered evidence of present fair value, contrary to the rule established by the United States Supreme Court in the *American Telephone & Telegraph* case, (d) it is an unconstitutional destruction of rights long since vested, and (e) it is grounded on the assumption by the Commission of jurisdiction over matters reserved by the Constitution to the judiciary and to the states.

POINT II

In ordering the disposition of the \$4,121,981.41 classified in Account 107, Electric Plant Adjustments, by writeoff to earned or capital surplus, the Commission is violating the constitutional rights of the Petitioners.

The Commission in Paragraph (B) of its Order has directed that Pacific dispose of the amount of \$4,121,981.41 classified in Account 107, Electric Plant Adjustments, by charging \$1,135,113.91 to a special surplus reserve previously established and the balance to earned surplus or a capital surplus properly created. This item of \$4,121,981.41

represents the difference between the cost to Pacific and the cost to American of certain properties acquired by American from various nonaffiliated interests and sold to Pacific in 1910 and in 1930. This item has been classified by the Commission in Account 107 rather than Account 100.5, which purports to represent the difference between cost to the accounting utility and original cost, on the theory that this \$4,121,981.41 was a mere "writeup" because it arose out of an intercompany transaction between parent and subsidiary. The Commission proceeds on the theory that cost under its System of Accounts means "system cost" rather than "company cost" where there are affiliated company relationships involved.

Petitioners are not quarreling with the Commission's giving this peculiar interpretation to the meaning of "cost" as applied to its system of accounts in so far as mere classification is concerned. It is for this reason that Pacific has withdrawn its objection to Paragraph (A) of the Commission's Order classifying this item in Account 107.

With respect to the disposition of this item, however, petitioners strongly insist that cost to American plus this adjustment item represents cost to Pacific insofar as Pacific's rights are concerned. The fact is, that as between Pacific and its security holders and American and its security holders, the total book value of the assets is the true corporate cost figure. The fact is that Pacific issued securities and stock for its assets to the full amount at which such assets are carried on its books. Cost is what is paid for a thing, irrespective of to whom it is paid. *Comm. v. Schumacher Wall Board Corp.*, 93 F.(2d) 79 (C. C. A. 9th, 1937.) Therefore the amounts at which Pacific's assets are carried on its books, while they do not represent, and do not purport to represent "system cost", do represent "company cost" and as such cannot be written off if shown to be supported by existing values for the reasons, already set forth in Point I above, which render

improper the Commission's order to amortize the \$2,741,591.66 in Account 100.5. The petitioners offered to prove existing values in the assets sufficient to cover every dollar of this cost to Pacific, but the Commission refused to consider such evidence, regarding it as irrelevant to the issues. In ordering the writeoff of the \$4,121,981.41 the Commission was clearly in error and its order is invalid under the rule of *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232.

However, even if the amount recorded on Pacific's books to the extent in excess of American's cost, is not regarded as "cost" in any sense of the word, but is regarded as a mere "write-up" the same principles forbid the expunging of this amount from the books if supported by present value. As was stated in *Re Jersey Central Power & Light Co.*, 33 P. U. R. (N. S.) 207, 212:

"* * * The identification of 'write-ups' in approximately this amount does not create, however, a supposition that the restatements of book cost were illegitimate, improper, or unreasonable at the time when made. In fact, the past recognition of appreciated values for accounting purposes is implied by the decision of the Supreme Court of New Jersey in *Passaic Consol. Water Co. v. Public Utility Comrs.* (1927) 5 N. J. Misc. R. 1078, P. U. R. 1928 B, 242, 139 Atl. 324 aff. [1928] 104 N. J. L. 666, 141 Atl. 921), to the effect that in 1925 a utility had the right to record on its books 'the full value of its property' * * *."

The reclassification of Pacific's accounts pursuant to the Commission's special system of accounts and the resulting inclusion of \$4,121,981.41 in Account 107, Electric Plant Adjustments, by no means involves an appropriate determination that the surplus recorded on Pacific's books and now required to be completely charged off is either non-existent or in any way impaired. *Randall v. Bailey, et al.*, 288 N. Y. 280. As Mr. Justice Brandeis said, in *Edwards v. Douglas*, 269 U. S. 204, at page 214:

"The word 'surplus' is a term commonly employed in corporate finance and accounting to designate an

account on corporate books. * * * The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. This surplus may be 'paid-in surplus,' as where the stock is issued at a price above par. It may be 'earned surplus,' as where it was derived wholly from undistributed profits. Or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company's fixed property. See *La Belle Iron Works v. United States*, 256 U. S. 377, 385."

Significant also in this connection is *Passaic Consolidated Water Company v. Board of Public Utility Commissioners*, 139 Atl. 324, affirmed 141 Atl. 921, in which the Supreme Court of New Jersey held that a utility had the right to record on its books "the full value of its property" and by clear implication approved the prior recognition of appreciated values for accounting purposes.

See also:

People ex rel. Iroquois Gas Corp. v. Pub. Serv. Comm., 264 N. Y. 17, 189 N. E. 764;

Matter of New York Edison Co. v. Maltbie, 244 App. Div. 685, affirmed 271 N. Y. 103;

Matter of Lockport Light, Heat & Power Co. v. Maltbie, 257 App. Div. 11, 12 N. Y. S. (2d) 595.

Conclusion

It is therefore submitted that the Order of the Commission dated November 24, 1942, in so far as it directs the amortization or write-off of amounts classified in Account 100.5, Electric Plant Acquisition Adjustments, or Account 107, Electric Plant Adjustments, without any consideration of the present values supporting the total book value of Pacific's assets, is beyond the statutory

and constitutional authority of the Commission, and is invalid as an unconstitutional deprivation of petitioner's property without due process of law and an unconstitutional assumption by the Commission of jurisdiction reserved by the Constitution to the judiciary and to the several states. If deemed to authorize said Order, Section 301 (a) of the Act is unconstitutional and void.

Respectfully submitted,

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No. 10386

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

PACIFIC POWER & LIGHT COMPANY AND AMERICAN
POWER & LIGHT COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

BRIEF FOR THE RESPONDENT

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WASHINGTON, D. C.,
September 1943.

FILED

OCT 2 - 1943

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10386

PACIFIC POWER & LIGHT COMPANY AND AMERICAN
POWER & LIGHT COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

This is a review, under Section 313 (b) of the Federal Power Act (49 Stat. 847), U. S. C., Title 16, § 825l (b), of Paragraphs (B) and (H) of the Federal Power Commission's order of November 24, 1942, requiring Pacific Power & Light Company¹ to correct its electric plant accounts in accordance with the Commission's Uniform System of Accounts, heretofore considered and approved by this Court in *Northwestern Electric Company v. Federal Power Commission*, 125 F. (2d) 882, and *Northwestern Electric Company v. Federal Power Commission*, 134 F. (2d) 740.²

¹ Pacific Power & Light Company is sometimes hereinafter referred to as "Pacific", American Power & Light Company as "American" and Pacific and American as "Petitioners."

² A petition for certiorari to review this decision is now pending, No. 195, Oct. Term, 1943.

Paragraph (B) of the Commission's order requires that Pacific eliminate a \$4,121,981.41 "write-up" from its accounts by charging \$1,135,113.91 to a special reserve heretofore created for that purpose,³ and by charging the balance of \$2,986,867.50 to surplus—either earned surplus or capital surplus as Pacific may elect (1 R. 61-62). There is no dispute with respect to the entire amount of \$4,121,981.41 being a "write-up" and as such it has been transferred by Pacific to Account 107, Electric Plant Adjustments, where it became subject to disposition "as the Commission may approve or direct" (Pet. Br. 11; 1 R. 61, 63-64; 2 R. 565-569). Petitioners object, however, to the disposition of the "write-up" prescribed by the Commission and advance substantially the same contentions as those considered and rejected by this Court when it affirmed a similar order in *Northwestern Electric Company v. Federal Power Commission*, 134 F. (2d) 740.

Paragraph (H) of the Commission's order here under review provides for the amortization of an amount of \$2,741,591.66 by annual charges to income over a ten-year period beginning in 1942 (1 R. 62-63). This amount is the portion of the acquisition cost to Pacific of certain utility systems which is in excess of the original cost of such systems (1 R. 157, 158, 168-176; 2 R. 440; 3 R., Ex. 17, Revised Statement B, pp. 17-44). This excess admittedly represented payment for "intangibles" such as going value, good will, nuisance value, franchise value, etc., and was essentially a

³ This reserve was created by Pacific for this purpose pursuant to a prior order of the Commission in another, but related, proceeding. *Pacific Power & Light Company et al.*, 2 F. P. C. 508, 511, 514-515; 42 P. U. R. (N. S.) 36, 39-40, 43.

capitalization of prospective earning power (Pet. Br. 16, 21, 22; 2 R. 391-393, 395, 400, 492-494, 514, 529-531). In accordance with the Uniform System of Accounts, Pacific has transferred the amount of \$2,741,591.66 to Account 100.5, Electric Plant Acquisition Adjustments, where it became subject to being "depreciated, amortized, or otherwise disposed of, as the Commission may approve or direct." Petitioners object to the ten-year amortization period prescribed by the Commission, but they recognize that the amount should not be retained permanently in Pacific's accounts, in which it has already lodged for as much as thirty-three years (Pet. Br. 3, 12, 14, 19; 1 R. 194; Appendix A of this brief, p. 38).

The issues on this review are therefore limited to the disposition of the \$4,121,981.41 "write-up" from Account 107, Electric Plant Adjustments, and the amortization of the \$2,741,591.66 of intangibles from Account 100.5, Electric Plant Acquisition Adjustments, prescribed in Paragraphs (B) and (H), respectively, of the Commission's order of November 24, 1942.

The uniform system of accounts

Against the background of information developed by the Federal Trade Commission's seven-year investigation of the utility industry⁴ which revealed the

⁴ In 1928, pursuant to Senate Resolution, the Trade Commission had undertaken a sweeping investigation of the public utility industry. The report of the Trade Commission fills 101 volumes. *Utility Corporations*, Sen. Doc. No. 92, 70th Cong., 1st Sess., 1935. This has been called "the most thoroughgoing investigation of an American industry that has ever appeared." Barnes, *The Economics of Public Utility Regulation* (1942), p. 71.

deficient and obscure accounting practices of utilities, Congress enacted the Federal Power Act, in which it conferred comprehensive accounting authority upon the Commission to meet and correct these deficiencies and to prevent their recurrence. *Section 301 (a)*.⁵

Prior to adoption of the Commission's Uniform System of Accounts, inflation and "write-ups" had been buried in the accounts, all the utility plant being frequently included in a lump-sum account so that it was impossible to ascertain the investment applicable to gas, electric, and other departments, much less the cost of generating stations, transmission lines, and other items of electric plant; and purchases made many years before were carried in one account from year to year without change in the amount recorded.⁶ Such conditions were, of course, detrimental to the investor and the consumer, and effective regulation, of which accounting, it has been truly said, is the heart-blood, was seriously impaired.⁷

⁵ This section authorizes the Commission to "prescribe a system of accounts to be kept by licensees and public utilities" and after "notice and opportunity for hearing" to "determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited." That section further provides that "The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry."

⁶ Federal Power Commission, *Twentieth Annual Report to Congress* (1940), p. 53; Tr. 1993-1994, Ex. 51. [Portions of the record certified but not printed will be cited as "Tr. 00" in accordance with a stipulation between counsel dated May 14, 1943, which stipulation is on file with this Court.]

⁷ Wilson, Herring, and Eutsler, *Public Utility Regulation* (1938), pp. 74-78; American Bar Association, Section of Public Utility Law, *Report by Committee on the Standards of Account-*

Having in mind these abuses and deficiencies, and in the light of the Congressional intent expressed in the Federal Power Act, the Commission undertook the preparation and promulgation of its Uniform System of Accounts. After the closest cooperation of a committee of the National Association of Railroad and Utilities Commissioners (N. A. R. U. C.) and of other State and Federal agencies, submission of the tentative draft to the State Commissions and to representatives of electric utilities, and receipt and consideration of all views and criticisms, the Commission prescribed its "Uniform System of Accounts for Public Utilities and Licensees." Federal Power Commission, *Sixteenth Annual Report to Congress* (1936), pp. 9, 10, 11; Tr. 1070, Ex. 1.⁸

One of the principal provisions of the Commission's System of Accounts (also contained in the system adopted by the N. A. R. U. C.) is the requirement that the utilities reclassify their electric plant accounts by prescribed accounts on the basis of original cost, that is, the cost of operating units or systems to the person

ing Prescribed for Public Utilities by Federal and State Authorities (1931), p. 7.

⁸ At or about the same time, the N. A. R. U. C. adopted a uniform system of accounts almost word for word the same as the Commission's, endorsed the Commission's system to the State Commissions, and recommended the use of either the Commission's or the N. A. R. U. C.'s system. Of the 42 regulatory commissions having jurisdiction over electric companies, 20 have prescribed the system adopted by the N. A. R. U. C. for use by electric companies subject to their jurisdiction, 16 have prescribed the Federal Power Commission's and the remaining 6 have prescribed modifications of the two systems. Moody's, *Public Utilities* (1943), page a38; see also Tr. 1993-1994, Ex. 51.

first devoting them to public service. The excess of book cost over original cost thus disclosed must be transferred to two adjustment accounts (Tr. 1070, Ex. 1, p. 19).

The portion of the excess representing "write-ups" or inflation must be placed in Account 107, Electric Plant Adjustments⁹ where it becomes subject to disposition "as the Commission may approve or direct."

The excess over original cost representing acquisition costs incurred in arm's-length transactions is placed in Account 100.5, Electric Plant Acquisition Adjustments,¹⁰ with a showing as to the nature of the excess, i. e., whether it represents going value, structural value, etc. These amounts are thereafter to be "depreciated, amortized, or otherwise disposed of, as the Commission may approve or direct" in the light of their nature and the applicable accounting principles (Tr. 1109, Ex. 5, p. 2).

As heretofore stated, this Court has reviewed and approved the Uniform System of Accounts prescribed by the Commission. Northwestern Electric Company

⁹ The text of Account 107 (Tr. 1070, Ex. 1, p. 19) provides that "Write-ups of electric plant prior to the effective date of this system of accounts shall be recorded herein" and "shall be disposed of as the Commission may approve or direct."

¹⁰ The text of Account 100.5 (Tr. 1070, Ex. 1, p. 19) provides that the difference between "the cost to the accounting utility of electric plant acquired as an operating unit or system" and the "original cost" is to be classified therein "according to the character of the amounts" and "shall be depreciated, amortized, or otherwise disposed of, as the Commission may approve or direct."

The provisions of Account 100.5 and Account 107 of the Commission's System of Accounts (Tr. 1070, Ex. 1, p. 19) and the provisions of the N. A. R. U. C. Accounts 100.5 and 107 (Tr. 2018, 2019, Ex. 51) are *in totidem verbis*.

v. *Federal Power Commission*, 125 F. (2d) 882, 886-7, and *Northwestern Electric Company v. Federal Power Commission*, 134 F. (2d) 740, 741.

History of proceedings

Pursuant to the requirements of the System of Accounts, Pacific, which is admittedly subject to the Act as a "public utility" (Pet. Br. 4; 1 R. 92; 2 R. 403-404), submitted its purported reclassification and original cost studies to the Commission on July 3, 1940 (3 R., Ex. 15).¹¹ The results of a joint investigation of such studies by the staff of the Federal Power Commission and the staff of the Public Utilities Commissioner of Oregon¹² were embodied in a joint report (3 R., Ex. 16) which was served on Pacific with an order of the Commission (1 R. 1-5) directing Pacific to show cause at a public hearing why it should not be required, *inter alia*, to correct its studies and make the accounting adjustments recommended in the joint report; as well as submit plans for disposition of the amounts which should be classified in Account 107, Electric Plant Adjustments, and Account 100.5, Electric Plant Acquisition Adjustments.

After Pacific had filed its revised studies (3 R. Ex. 17), extended hearings were held, at which American,

¹¹ Under accounting requirements of the Oregon Commissioner (Tr. 1617, Ex. 49) and the Department of Public Service of Washington (Tr. 1991, Ex. 51), similar to those of the Federal Power Commission, Pacific filed identical studies with these state regulatory bodies (1 R. 118, 119).

¹² Examination of Pacific's studies was made jointly by the staff of the Commission and the staff of the Oregon Commissioner with the assistance, through consultation, of the staff of the Washington Commission (2 R. 405-406, 484).

Pacific's parent company, was permitted to intervene (1 R. 112 through 3 R. Ex. 17)..¹³

Following the submission of briefs, the Commission adopted its Opinion No. 84 (1 R. 36-60; 46 P. U. R. (N. S.) 131) finding that the \$4,121,981.41 "is properly classifiable in Account 107, Electric Plant Adjustments" as "a write-up of electric plant" (1 R. 47) which was recorded in Pacific's books of account as a result of transfers of certain properties to Pacific in 1910 and 1930 by American, which completely controlled and dominated Pacific (1 R. 42), that these transfers were under circumstances in which there was a "complete absence of arm's-length bargaining and of independence of judgment" (1 R. 43) and that they represented "nothing more than American dealing with itself" (1 R. 44).

Regarding disposition of the "write-up" the Commission said (1 R. 47):

* * * The provisions of Account 107 require the amounts recorded therein to be disposed of as we may approve or direct. We hold that, in accordance with sound principles of accounting, the amounts should be expunged immediately. We now turn to a consideration of disposition.

In Opinion No. 69, adopted on December 9, 1941, we approved, subject to certain conditions, the merger of Inland Power & Light

¹³ American, the Oregon Commissioner and the Washington Commission were granted leave to intervene in the hearing (1 R. 10, 14, 15). Honorable Ormond R. Bean, at that time Public Utilities Commissioner of Oregon, presided jointly with the Trial Examiner of the Commission at the hearing (1 R. 38).

Company with and into Pacific. In our order we required Pacific to set up a special reserve in the amount of \$1,135,113.91, being an amount by which the cost to Inland of the net assets transferred to Pacific exceeded Pacific's cost of the stock of Inland. We said in Opinion No. 69 that this "reserve shall be used only for such purposes as this Commission may subsequently approve or direct." The transactions giving rise to the reserve are associated with transactions giving rise to the amount of \$4,121,981.41 classifiable in Account 107. We accordingly find that \$1,135,113.91 of the \$4,121,981.41 should be charged to this special reserve.

We direct that the balance of \$2,986,867.50 (\$4,121,981.41 less \$1,135,113.91) be charged to Earned Surplus; provided, however, that Pacific may at its election charge all or any part of the said \$2,986,867.50 against a Capital Surplus properly created for such purpose.

With respect to the \$2,741,591.66, which Pacific classified in Account 100.5, Electric Plant Acquisition Adjustments, the Commission found that this amount "represent(ed) payment for intangibles" (1 R. 49) acquired "as far back as 1910" which "have been carried on Pacific's books all those years without any provision having been made, as good accounting practice demands, for writing off any part thereof" (1 R. 51). The Commission further found that the amounts representing these intangibles "should not be permitted to rest permanently in the accounts of a public utility" (1 R. 49) and should, in this case, be amortized over a "period of ten years, beginning with 1942" by "equal

annual charges * * * to Account 537, Miscellaneous Amortization" (1 R. 51).¹⁴

The order of November 24, 1942 (1 R. 61-64), accompanying the Commission's Opinion No. 84, provided in Paragraph (B), that Pacific should dispose of the \$4,121,981.41 "write-up" from Account 107, Electric Plant Adjustments, by charging \$1,135,113.91 to a special reserve heretofore created for that purpose and by charging the balance of \$2,986,867.50 to surplus—either earned surplus or capital surplus as Pacific may elect. The order further provided, in Paragraph (H), that Pacific should amortize the \$2,741,591.66 of "intangibles" from Account 100.5, Electric Plant Acquisition Adjustments, by annual charges to income over a ten-year period beginning in 1942 (1 R. 62-63).

Applications for rehearing filed by Pacific and American (1 R. 64-79) were denied by the Commission (1 R. 80-81) and a petition for review was thereupon filed in this Court on March 11, 1943.¹⁵

STATUTES INVOLVED

Pertinent excerpts from the Federal Power Act ^{AK} ~~as~~ set forth in the Appendix to this brief.

¹⁴ The text of Account 537 provides that it "shall include" such "amounts as the Commission may, by order, require to be included herein, such as amortization of amounts in Account 100.5, Electric Plant Acquisition Adjustments" (Tr. 1070, Ex. 1, p. 94).

¹⁵ Rehearing and review had also been sought with respect to Paragraph (A) of the Commission's order requiring the \$4,121,981.41 to be classified in Account 107 as a "write-up", but on August 12, 1943, just prior to the due date of petitioners' brief herein, Pacific complied with this provision of the Commission's order (see 2 R. 565-569).

SUMMARY OF ARGUMENT

The Commission's finding that the \$4,121,981.41 is a "write-up" is clearly supported by substantial evidence and is no longer disputed by Pacific which has transferred this amount to Account 107, Electric Plant Adjustments, where it became subject to disposition "as the Commission may approve or direct." The disposition of the "write-up" to a special reserve and to surplus prescribed by the Commission is likewise supported by substantial evidence. Petitioners have proposed no "possible alternative * * * although the opportunity to do so has been long open" (*Alabama Power Co. v. Federal Power Commission* (App. D. C.), 128 F. (2d) 280, 295-296, *cert. denied*, 317 U. S. 652), and on this review they merely advance the same objections which this Court considered and rejected in affirming a similar order in *Northwestern Electric Co. v. Federal Power Commission*, 134 F. (2d) 740.

Pacific transferred \$2,741,591.66 to Account 100.5, Electric Plant Acquisition Adjustments, as the portion of the acquisition cost to Pacific of certain utility systems which was in excess of the original cost of such systems. This excess admittedly represented payment for "intangibles" such as going value, goodwill, nuisance value, etc., and was essentially a capitalization of prospective earning power. (*Cf., Niagara Falls Power Co. v. Federal Power Commission* (C. C. A., 2nd), —F. (2d) —, decided July 29, 1943).

The Commission's finding that such "intangibles" should be amortized by annual charges to income over a ten-year period beginning in 1942 is clearly supported by substantial evidence and the accounting authorities. These "intangibles" admittedly should not remain permanently in Pacific's accounts, in which they have already lodged for some twenty to thirty years.

Petitioners' belated objection that the amortization should be made through Account 505, Amortization of Electric Plant Acquisition Adjustments, as an operating expense, instead of Account 537, Miscellaneous Amortization, as an income deduction, is without merit. In this proceeding, which is admittedly not a rate case, "The label is unimportant, whether depreciation or amortization, if the substance of allowance is adequately preserved" (*American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, 244). Moreover, the amount of income available for surplus is the same whether the amortization is through Account 537 or Account 505.

If the result of the Commission's order is to divert earnings which would otherwise be available for dividends, such result flows from the legitimate exercise of the Commission's accounting authority. *Northwestern Electric Company v. Federal Power Commission* (C. C. A. 9, 1943), 134 F. (2d) 740, 744-745; *Kansas City So. Ry. v. United States*, 231 U. S. 423, 453, 455.

ARGUMENT

I

The Federal Power Commission is clearly authorized to require Pacific to eliminate the "write-up" from its accounts

Pacific no longer objects to the Commission's finding that the amount of \$4,121,981.41 is a "write-up" and on August 12, 1943, it transferred this amount to Account 107, Electric Plant Adjustments¹⁶ (Pet. Br. 3, 43; 2 R. 565-569). The facts surrounding the "write-up" may therefore be summarized without extended discussion.

Some time late in 1909 or the early part of 1910, American turned its attention to the Pacific Northwest and began the acquisition of utility properties in that territory (2 R. 276). Through the acquisition of capital stock, it acquired control of various utility properties in the Yakima Valley (2 R. 276, 414-415). When it had succeeded in acquiring control of these utility properties, American caused the incorporation of Yakima-Pasco Power Company in March 1910, and of Columbia Power & Light Company in April 1910, to serve "as a temporary gathering place for [these] properties which [American] expected to turn over" to Pacific, which had not yet been formed (2 R. 274, 275, 276, 414, 415). The properties acquired in the Yakima Valley, with the exception of those of Astoria Electric Company, were at the instance of American, then transferred to Yakima-Pasco and Columbia com-

¹⁶ Account 107 provides that "write-ups of electric plant" shall be recorded therein and thereafter "disposed of as the Commission may approve or direct" (Tr. 1070, Ex. 1, p. 19).

panies (2 R. 276). The properties of Astoria Electric Company, an isolated electric system in the State of Oregon, remained in that corporate organization until all of the properties were finally transferred to Pacific (2 R. 276-277).

“After having assembled [these] properties for operation by Pacific” (1 R. 222; 2 R. 274, 414), American caused the incorporation of Pacific under the laws of Maine on June 16, 1910 (1 R. 128, 221, 222; 2 R. 274, 414, 415), and caused Yakima-Pasco, Columbia, and Astoria companies, through a nominee of American, to transfer their properties to Pacific (1 R. 93, 159-167; 2 R. 414).

In return for these properties, American had Pacific deliver to it \$5,997,000 par value of common stock, \$1,250,000 par value of preferred stock, \$3,200,000 principal amount of bonds and certain other minor obligations (2 R. 415). To balance the securities and other obligations issued to American, Pacific recorded the properties, costing American \$6,154,251.34, on its books at \$10,900,000, or \$4,745,748.66 in excess of American's *bona fide* cost incurred in arm's-length transactions¹⁷ (2 R. 277, 279, 280, 281, 439).

Upon receipt of these securities, American, in accordance with its predetermined plan, sold the bonds and preferred stock to the public, retaining the common stock which it still owns (2 R. 224).

¹⁷ In 1930, American transferred to Pacific certain properties of its wholly owned subsidiary, Inland Power & Light Company, at a recorded cost to Pacific of \$623,767.25 less than actual cost to American. The effect of this transfer was to reduce the excess of recorded cost to Pacific over cost to American involved in the 1910 transfer to the net figure of \$4,121,981.41 (2 R. 428-431).

Upon consideration of the overwhelming evidence that American had controlled Astoria Electric Company; had organized, controlled, and dominated Yakima-Pasco Power Company, Columbia Power & Light Company, and Pacific; and had caused the organization of the companies and the transfers of the property as part of a predetermined and preconceived plan, developed by American, in which the amount Pacific was to pay for the properties had been decided by American even before Pacific was in existence, the Commission found that the "amount of \$4,121,981.41 is a write-up of electric plant * * * classifiable in Account 107, Electric Plant Adjustments"¹⁸ (1 R. 47) finding that there was a "complete absence of arm's-length bargaining and of independence of judgment" in the 1910 transfer (1 R. 43); that "the transaction represented nothing more than American dealing with itself" (1 R. 44); that the "buyers and sellers" were "mere tools of the holding company" (1 R. 44) and that "no one in good conscience could make the claim that the excess of \$4,121,981.41 represents actual bona fide cost" (1 R. 44).

Based upon the uncontroverted expert testimony of two of its principal accounting officers that the "write-

¹⁸ For the details of this evidence see the record at pages 1 R. 93, 128, 221-224, 226, 227-231, 233, 238-242, and 272; 2 R. 273-276, 282, 298-299, 301-302, 323, 325-327, 347-348, 385, 388, 414-415; and Exhibits 20 (1 R. 159-167), 22 (1 R. 243-245), 32 (2 R. 294-297), 33 (2 R. 350, 361), and 34 (2 R. 369-371). In the light of the overwhelming and conclusive evidence on this point, "It is difficult to see how the Commission could have found otherwise." *Puget Sound Power & Light Co. v. Federal Power Comm.* (App. D. C., decided August 23, 1943) — F. (2d) —.

up" should be eliminated from the accounts of Pacific, in accordance with sound principles of accounting, by a charge to Earned Surplus or Capital Surplus (2 R. 488, 534), the Commission directed the elimination of \$1,135,113.91 of the "write-up" to a special reserve created by Pacific for such purpose (1 R. 47, 61) and of \$2,986,867.50 of the "write-up" by a charge to Earned Surplus, with the proviso that Pacific at its election may charge all or any part of the latter amount to a capital surplus properly created for such purpose (1 R. 48, 61-62).

Petitioners do not contend that the Commission's method of disposition of the "write-up" is not supported by substantial evidence (Pet. Br. 42-45).¹⁹ Moreover, since all amounts transferred to Account 107 become subject to disposition "as the Commission may approve or direct," the Commission's authority to dispose of the "write-up", as distinguished from the method of such disposition, is not properly in issue. *American Tel. & Tel. Co. v. United States*, 299 U. S. 232, 240. Assuming, however, *arguendo*, that the question may now be raised, the authority of the Commission to require such disposition has been settled in *Northwestern Electric Company v. Federal*

¹⁹ Not only is the method of disposition directed supported by uncontroverted and substantial evidence, but, in addition, Pacific has not proposed any other plan of disposition of the "write-up." Having made "no suggestion of any possible alternative to that proposed by the Commission, although the opportunity to do so has been long open" Pacific is now precluded from questioning "the propriety of the order." *Alabama Power Co. v. Federal Power Comm.* (App. D. C.), 128 F. (2d) 280, 295-296, *cert. den.* 317 U. S. 652.

Power Commission, 125 F. (2d) 882, and *Northwestern Electric Company v. Federal Power Commission*, 134 F. (2d) 740, and by the unanimous decisions of other Courts.²⁰

The *Northwestern* cases likewise dispose of petitioners' contentions that the Commission is without authority "to require the elimination from the asset side of the balance sheet of a public utility of any sum fully supported by the present fair value of its assets" (Pet. Br. 15, 43-44); that the Commission erred in "ignoring, and in refusing to permit the introduction of" evidence "which fully establishes [that] the fair value of Pacific's assets is equal to or in excess of the recorded book value thereof" as "immaterial and irrelevant" (Pet. Br. 15); and that the Commission's authority to eliminate the "write-up" is not retroactive (Pet. Br. 15).

Petitioners are unable to distinguish this case from the *Northwestern* cases. Under the principle of *stare decisis* an extended discussion of petitioners' conten-

²⁰ *Louisville Gas & Electric Co. v. Federal Power Commission* (C. C. A. 6th), 129 F. (2d) 126, *cert. den.*, February 8, 1943, No. 616, Oct. Term, 1942; *Alabama Power Co. v. Federal Power Commission* (App. D. C.), 128 F. (2d) 280, *cert. den.* 317 U. S. 652; *Northern States Power Co. v. Federal Power Commission* (C. C. A. 7th), 118 F. (2d) 141. The Commission is authorized by Section 301 (a) of the Act to prescribe a system of accounts with which every public utility and licensee is required to comply, and which carries with it the authority to require proper accounting adjustments. *American Tel. & Tel. Co. v. United States*, 299 U. S. 232, 240; *Norfolk & Western Ry. Co. v. United States*, 287 U. S. 134, 141; *Kansas City So. Ry. Co. v. United States*, 231 U. S. 423, 440; *Long Beach Gas Co. v. Maltbie*, 36 N. Y. S. (2d) 194, 203-204, *affirmed* 48 N. E. (2d) 167.

tions respecting the relevancy of "value" evidence therefore does not appear to be necessary or appropriate. *Jaffe v. Federal Trade Commission* (C. C. A. 7th, 1941), 123 F. (2d) 814; *Grand Rapids & I. R. Co. v. Blanchard* (C. C. A. 6th, 1930), 38 F. (2d) 470.

The following quotations from this Court's opinion in *Northwestern Electric Company v. Federal Power Commission*, 134 F. (2d) 740, are particularly pertinent:

This is the second chapter of the story of a controversy between Northwestern Electric Company, petitioner, and the Federal Power Commission. We first considered the conflict in *Northwestern Electric Co. v. Federal Power Comm'n.*, 9 Cir., 125 F. (2d) 882. As there stated the Federal Power Act authorizes the Commission to prescribe a system of accounts. On the first review we sustained the power of the Commission to prescribe the system of accounts it did prescribe. That system requires accounts to show the original cost of the assets (p. 741).

* * * * *

The arguments that the actual values of petitioner's business has been ignored by the Commission are not pertinent. On the first review we approved the system of accounts prescribed, and we will not revive the arguments (p. 744).

* * * * *

Petitioner also contends that the order is arbitrary and capricious because: * * *
(4) [It ignores] the actual values of petitioner's properties. The first and fourth of these rea-

sons are not pertinent because they have no bearing on the "original cost" theory of the system of accounts (p. 744).

II

The amortization of the "intangibles" prescribed by the Commission is fully supported by substantial evidence

Pacific has classified \$2,741,591.66 in Account 100.5, Electric Plant Acquisition Adjustments. This amount had its origin in fifteen acquisitions of property by Pacific, nine acquisitions having occurred in 1909-1911, some thirty-three years ago; three in 1915-1916, some twenty-seven years ago; one in 1923, some twenty years ago; and two, involving insignificant amounts, in 1928 and 1935.²¹

Practically all of the \$2,741,591.66 relates to two transactions which took place some twenty and thirty-three years ago. During this long period none of this amount has been depreciated, amortized or otherwise disposed of, although, as admitted by Pacific, much of the property acquired has been rebuilt, expanded, changed or retired to such an extent that it is not now possible to identify fully whatever portion of the acquired property is still in existence (3 R., Ex. 15, p. 118; Ex. 17, Revised Statement B, p. 37).²²

²¹ Facing page 38 of this brief, as Appendix A, we have printed in tabulation form a detailed analysis of this amount. The tabulation can be unfolded and read in connection with the text of the brief.

²² The properties were, in many instances, in existence long before they were acquired by Pacific. They go back as far as 1885 and passed through several ownerships prior to acquisition by Pacific (e. g., 1 R. 128, 157; Ex. 15, p. 23; 3 R., Ex. 17, Revised Statement B, pp. 16, 17, 37, 38-40).

Petitioners concede that the \$2,741,591.66 excess of acquisition cost over original cost represented a payment by Pacific for intangibles (Pet. Br. 16, 21, 22). Moreover, petitioners describe the properties acquired as "local steam and small hydro-electric generating and distribution systems, which, in general, had developed from makeshift beginnings in connection with saw-mills, flourmills and other enterprises of a similar nature, which were valuable going concerns in 1910, but were not, generally speaking, efficiently equipped with adequate generating and distributing facilities, from the standpoint of the art as then developed" (Pet. Br. 6, 7).

At the hearing, Pacific's witness Will T. Neill, Vice-President of Pacific, and the Commission's expert witnesses, Mr. Charles W. Smith, Chief of the Bureau of Accounts, Rates and Statistics and Mr. Melwood W. Van Scoyoc, Chief of the Commission's Division of Original Cost, agreed that Pacific paid for intangibles (2 R. 391-392, 395, 400, 492-493, 529); that these intangibles included goodwill,²³ going value, nuisance value,²⁴ franchise value and, *inter alia*, monopoly value (2 R. 392, 393, 494, 514, 530-531); that the intangibles are rooted in and based upon the purchasers' evaluation

²³ In the opinion of petitioners' witness Neill, goodwill is a part of going value (2 R. 392). *Accord*, see: *The Law of Goodwill*, G. A. D. Preinreich, December 1936, 11 Acctg. Rev. 317, 325-326—"Franchise, going value, and goodwill are one and the same thing."

²⁴ Pacific concedes that "it is also fair to assume that the purchase price to Pacific" of Hydro-Electric Company, acquired in 1915 and involving \$115,718.63, "may have been influenced by and have included recognition of a 'nuisance value' of the properties in the hands of the original stockholders of Hydro-Electric Company" (3 R., Ex. 17, Revised Statement B, p. 11).

of "the prospective earning power of the situation",²⁵ (2 R. 392, 393, 494, 530-531); that all of these intangibles "tend to merge" and that "it would be highly speculative and an impractical thing to" divide them up, segregate or pigeon hole them (2 R. 393, 494, 530-531).

The Commission's finding, which is not contested, that the \$2,741,591.66 represented payment for intangibles, is therefore clearly supported by substantial evidence and is conclusive within the meaning of Section 313 (b) of the Act.²⁶

The Commission's finding that the amount should be amortized from Account 100.5, Electric Plant Acquisition Adjustments, by specified annual charges to income is similarly supported by the uncontroverted expert testimony of two of the principal accounting officers of the Commission.

Witness Van Scoyoc, whose qualifications were unquestioned, testified (2 R. 494-496):

Q. Do you believe that intangibles bought and paid for have a permanent place in the plant accounts of a public utility?

²⁵ As Judge Learned Hand pointed out in *Niagara Falls Power Company v. Federal Power Commission* (C. C. A. 2d, July 29, 1943), — F. (2d) —, "The only factor which determines its price (the price of a plant, built and in operation) is the 'prospective revenues' which it will produce."

²⁶ *Montana Power Company v. Federal Power Commission* (C. C. A. 9th, 1940), 112 F. (2d) 371, 374; *Northwestern Electric Company v. Federal Power Commission* (C. C. A. 9th, 1942), 125 F. (2d) 882, 887; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146 (1939); and see also the concurring opinion of Judge Healy in *Northwestern Electric Company v. Federal Power Commission* (C. C. A. 9th, 1943), 134 F. (2d) 740, 745.

A. No, sir; I do not. Intangibles have a very questionable value, as well as life. There is no more reason to retain permanently the cost of an intangible in the books of account than there is to retain the cost of tangible property in the accounts after it has been physically retired. The difficulty lies in the fact that the life of an intangible is uncertain and its decline in value is not as easily ascertainable as that of tangible property. The sane and prudent thing for management to do is to provide for its ultimate loss in value. It is good accounting and it is practiced to a large extent by non-utility business enterprises. I might add that it is beginning to be practiced by a good many public utilities with which we have come in contact in our reclassification work.

Q. Do you have any specific recommendation with respect to the disposition of the amount in the acquisition adjustment account of \$2,741,-591.66?

* * * * *

A. * * * Yes. My recommendation would be that this amount be disposed of from Account 100.5 by equal annual charges to Account 537, over a period of 10 or 15 years commencing with the year 1941.

* * * * *

Q. Why do you recommend a 10 or 15-year amortization period?

A. While I believe a shorter period would be more desirable in view of the fact that approximately one-half of the acquisition adjustment has been carried on the books of the Company for 30 years, in matters of this kind a practical

solution is sought and, in my judgment, an amortization program of 10 or 15 years will satisfactorily accomplish the disposition of the acquisition adjustment.²⁷

Witness Charles W. Smith, whose qualifications as an expert accountant were also unquestioned, testified (2R. 530-532, 533):

A. The amounts which the staff recommends be included in Account 100.5 represent acquisitions made in 1910 and 1930, although the latter acquisitions go several years back of 1930 when the properties involved were purchased by an affiliated seller. Hence these intangibles have been on the books a long time. * * * They have no permanent place in the accounts of a public utility. * * * In my opinion all amounts in the plant accounts should be charged off some time. The cost of physical items should be removed when the properties with which they are associated are retired. Intangibles are evasive and disappear without being seen. We only perceive the result of their disappearance. Thus rapid charge-offs of intangibles are required, I believe, by good accounting, good management, and good regulation.

* * * * *

²⁷ Cf. Justice Black dissenting, *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 436: "‘Intangibles’ * * * might well be defined as ‘properties’ that can neither be seen nor touched and which can rarely be understood. * * * These property concepts are so uncertain, tenuous, and elusive that no two witnesses give them the same value except on occasions when several witnesses have been employed by the same litigant." See also: Kester, Roy B., *Principles of Accounting* (1939), p. 573, commenting on "intangible nature of goodwill" and "its more or less speculative value."

The amounts I am discussing have been in the accounts of the Pacific Company for a very long time. The conditions under which the properties were bought will not go on forever. Changes are constantly taking place. New forces, new inventions, new economic conditions prevail. I think, therefore, that these amounts which have already rested in the accounts a very long time ought to be disposed of quickly. It is my opinion that they should be disposed of over a period not in excess of 10 or 15 years at the most.

* * * * *

Q. To what account should the amortization of amounts representing the cost of intangibles, included in Account 100.5, be charged if the Commission should approve an amortization plan such as you have suggested?

A. The amounts I believe should be amortized by charges to Account 537, Miscellaneous Amortization. I believe the best accounting practice is to charge off the cost of intangibles to the final section of the income statement, and Account 537 seems most appropriate in this connection.

Moreover, Pacific, which had the burden of proof (Section 301 (a)),²⁸ did not propose to retain the \$2,741,591.66 in Account 100.5, permanently, but only until “the complete retirement or disposition of the

²⁸ As was held by this Court in *Northwestern Electric Company v. Federal Power Commission*, 134 F. (2d) 740, 743, Section 301 (a) of the Federal Power Act imposes upon the utility whose accounting entries have been questioned by the Commission, the “burden of going forward” with “substantial evidence” to “justify” such entries.

respective systems to which the components of this total respectively apply; and at such time or times to remove from Account 100.5 so much thereof as pertains to the system acquisitions then retired or disposed of" (1 R. 194) and further, "in the event of the complete retirement or disposition of any system representing less than the total of one of the several acquisitions" to apportion "the amount of the 100.5 acquisition adjustment cost applicable to the entire acquisition, in such manner and on such bases as will fairly reflect the relation of the systems so disposed of or retired to the total acquisition" (1 R. 194).

Pacific did not sustain its "burden of going forward" with "substantial evidence" to "justify" its plan of disposition, though it has had every opportunity to do so. The average life of steam-electric property is 31 years and of hydro-electric property, it is 40 years (*U. S. Treasury Department, Bureau of Internal Revenue, Bulletin "F", Revised January 1942, p. 61*). The property acquired by Pacific is as much as thirty-three years old. It should by this time have been substantially, if not entirely, retired. *Southern Colorado Power Company*, — S. E. C. —; S. E. C. File Nos. 54-55 and 59-51, Holding Company Act of 1935, Release No. 4501, August 24, 1943, pp. 25-26; *Ogden Corporation*, — S. E. C. —; S. E. C. File No. 54-69, Holding Company Act of 1935, Release No. 4307, May 21, 1943, p. 23. Moreover, the evidence indicates that the property with which the \$2,741,591.66 originated is no longer in existence. The record shows that it has been rebuilt, expanded,

changed, and retired to the point that Pacific is unable to say that any part of it still exists today (3 R., Ex. 15, pp. 31, 32, 46, 118; Ex. 17, Revised Statement B, p. 37). Thus, under any theory of the case the \$2,741,591.66 should be amortized and the Commission was very liberal in permitting Pacific another ten years within which to accomplish such amortization.

Contrary to petitioners' contention (Pet. Br. 20-26) the amortization of the intangibles prescribed by the Commission is fully supported by the accounting authorities.

The *Accountants' Handbook, Third Edition*, Paton (1943), pp. 850-851, clearly recognizes that it is in accordance with correct principles of accounting to amortize the cost of intangibles.²⁹ This is true even when they have a "present value", Sherwood, J. F., & Hornberger, D. J., *Fundamentals of Auditing*, (1933), p. 146. Also Kester, Roy B., *Principles of Accounting*, 1939, p. 573.

The amortization of intangibles is supported by Sanders, Hatfield, and Moore, in their *Statement of Accounting Principles* published in 1938 by the American Institute of Accountants. The anticipatory attempt of petitioners (Pet. Br. 23-25) to disparage "the writing off of amounts paid for intangibles [as] a principle of conservatism rather than accounting"

²⁹ Though the Handbook refers to Goodwill, that intangible "is the most important and typical intangible asset" and refers to "all the favorable attitudes impinging upon the concern" so that discussion of it serves for the group of intangibles. *Accountants' Handbook, Third Edition* (1943), pp. 845-846; *A Statement of Accounting Principles*, Sanders, Hatfield and Moore (1938), p. 67.

is without merit. As is indicated by the title, the writers were setting forth "*A Statement of Accounting Principles.*" They also state (at pages 68, 69) that though there "is a marked difference of opinion and practice as to whether or not goodwill should be written off" and that the "regular amortization of goodwill is not considered imperative", such a treatment "is not considered objectionable." For the purpose of administering the Federal Power Act, the Commission may, of course, choose that method of accounting which in its judgment is best fitted for the performance of its statutory duties. *American Telephone & Telegraph Co. v. United States* (D. C., S. D., N. Y.), 14 F. Supp. 121, 129; *aff'd* 299 U. S. 232; *Norfolk & Western Ry. Co. v. United States*, 287 U. S. 134, 141, 143.³⁰

Nor is it material that the Bureau of Internal Revenue may allow no deduction from taxable income (Pet. Br. 22) for "depreciation, including obsolescence, * * * in respect of goodwill." In the first place, the tax cases cited by petitioners (Br. 23) do not support their contention that the accounting practice prescribed by the Commission is unsound. Secondly, the rule for income-tax purposes has been said to be "seriously objectionable" (Paton's *Accountants' Handbook*, Third Edition, 1943, p. 851); and finally, the Board of Tax Appeals in *First National Bank of St. Louis*, 3 B. T. A. 807, 808-809, itself stated that "as we have heretofore had occasion to remark,

³⁰ The Commission's determination is one "informed by experience" and is entitled to great weight. *Virginian Ry. Co. v. United States*, 272 U. S. 658, 665-666.

the income tax laws are not always in accord with accounting practice.” Cf. *Kansas City Southern Ry. v. Commissioner* (C. C. A., 8th, 1931), 52 F. (2d) 372, 378, *cert. den.* 284 U. S. 676 (1931); *Chesapeake & Ohio Ry. v. United States* (E. D. Va., 1933), 5 F. Supp. 7, 10.

Further support of the Commission's requirement that intangibles be amortized is found in the Interstate Commerce Commission's consistent practice of approving purchases of property, where the excess of purchase cost over cost to the seller represents a payment for intangibles, only upon the condition that the amount of intangibles be amortized or written off at once. *Crown Coach Company*, 36 M. C. C. 144, 147 (1940); *Herrin Transportation Company*, 25 M. C. C. 710, 712 (1939); *Buckingham Transportation Company of Colorado, Inc.*, 25 M. C. C. 667, 670 (1939); *Mason & Dixon Lines, Inc.*, 36 M. C. C. 475, 481 (1941); and a host of other cases cited at 25 M. C. C. 832.³¹

In *Re Illinois Power & Light Corporation*, P. U. R. 1928 A, 776, 779-780, the Illinois Commerce Commission approved an acquisition of property only upon condition that the excess of the purchase price over cost to the predecessor be amortized or written off at once and not be reflected in fixed capital accounts. That Commission held that while a prospective purchaser might feel warranted in paying such excess

³¹ And see *Re Tuolumne County Electric Power & Light Company* (California Railroad Commission), P. U. R. 1928 C, 31, 33-34; *Re California Tel. & Light Company* (California Railroad Commission), P. U. R. 1929 D, 221, 224; *Re Nevada, California & Oregon Tel. & Tel. Co.* (California Railroad Commission), P. U. R. 1929 D, 43, 49-50.

because he anticipated being able to develop the property beyond that realized by the seller thus increasing the net return, the inclusion of such excess in fixed capital was unwarranted and against the public interest.

The fact that these cases involved the approval of the acquisition of property does not distinguish them from the case at bar, since the principle is the same. They clearly hold that intangibles should not remain permanently in the plant accounts but should be amortized or written off at once. In *Herrin Transportation Company, supra*, the Interstate Commerce Commission stated that "The public interest requires that a carrier refrain from reflecting figures in its accounts likely to create a false impression, and we do not believe that we should approve a transaction under section 213 unless steps are to be taken to eliminate from the accounts any fictitious increase in assets represented by amounts paid for intangible property." And in *East Texas Motor Freight Lines*, 25 M. C. C. 779, 782, that Commission pointed out that its findings were conditioned to permit amortization of the intangible property account over a reasonable period of years "As an aid in fostering sound financial and economic conditions in the motor-carrier industry."

It is likewise significant that in conditioning its approvals upon the elimination of the intangibles, the Interstate Commerce Commission has clearly indicated that the accounting prescribed therefor is in accord with its uniform system of accounts. *System Freight Service*, 36 M. C. C. 601, 604-605 (1941); *Andrew B. Crichton et al.*, 25 M. C. C. 783, 785-787 (1939).

The experience of the Federal Power Commission in the administration of the Act further confirms the propriety of its method of amortizing intangibles from Account 100.5. As shown in Appendix B to this brief, the Commission, between November 1940 and September 1943, approved thirty-three voluntary applications from electric utilities proposing plans for amortization of amounts established in Account 100.5.³²

III

Petitioners' objections to the Commission's amortization of the "intangibles" are without merit

As heretofore stated, Pacific has transferred the \$2,741,591.66 of "intangibles" to Account 100.5, Electric Plant Acquisition Adjustments, where it became subject to being "depreciated, amortized, or otherwise disposed of, as the Commission may approve or direct." Petitioners do not, and validly could not, challenge the Commission's authority to prescribe such an account. *Northwestern* cases, *supra*. It is fully within the holding of the Supreme Court in *American Telephone & Telegraph Company v. United States*, 299 U. S. 232, sustaining a similar provision in the system of accounts of the Federal Communications Commission. The Court there held that the acquisition cost in excess of original cost could properly be disposed of "after the character of the item

³² During the eleven-year period 1929 to 1939, ninety-eight industrial concerns in the United States "voluntarily wrote off intangible assets on their books" to the extent of \$786,000,000. *Accounting for Intangible Assets*, Harold G. Avery, 17 Acctg. Rev. 354-363 (October 1942).

had been determined” and that such disposition “must depend upon evidentiary circumstances, difficult to define or catalogue in advance of the event” (pp. 240, 242).

In this proceeding, extended hearings were held and the origin and nature of the \$2,741,591.66 were fully explored and established. It admittedly represented “intangibles” and, as petitioners recognize, this amount cannot remain permanently in Pacific’s accounts (1 R. 194). The Commission’s finding that this amount should be amortized by annual charges to income over a ten-year period, beginning in 1942, is, as shown under Point II of this brief, fully supported by substantial evidence and in accord with correct principles of accounting.

Petitioners’ belated contention (Br. 27, 28, 39) that the amortization should have been through Account 505, Amortization of Electric Plant Acquisition Adjustments, instead of Account 537, Miscellaneous Amortization, is also without merit. Contrary to the express requirement of Section 313 (b) of the Act, this objection was not urged in petitioners’ applications for rehearing (1 R. 64, 68-70, 71, 76-77) or in the petition for review (1 R. 91, 103-104), and petitioners assign no grounds for their failure so to do.³³

Since the \$2,741,591.66 admittedly represented “intangibles,” which are essentially rooted in earning power, rather than tangible property which is utilized

³³ Section 313 (b) of the Act provides: “No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”

in operations, the amortization is properly made through Account 537, as an income deduction, and not through Account 505, as an operating expense. This is clearly supported by the accounting authorities, Sherwood, J. F., & Hornberger, D. J., *Fundamentals of Auditing* (1933), p. 148; Greeley, Harold Dudley, *Theory of Accounts* (1920), Vol. I, p. 410; Kester, Roy B., *Principles of Accounting* (1939), p. 573; Sanders, Hatfield and Moore, *A Statement of Accounting Principles* (1938), p. 69. Moreover, the Interstate Commerce Commission has required the amortization of intangibles by charges to income or their immediate elimination by charges to surplus. (See cases cited at pp. 28, 29, *supra*.)

Whether the amortization is through Account 505 or Account 537 does not involve any deprivation or confiscation of property, since the amount of income available for surplus is not affected. This is demonstrated in Appendix C to this brief. We there have taken Pacific's income statement for the twelve months ending December 31, 1940, as reported to the Commission in Pacific's Annual Report (which is in evidence in this proceeding), and show that the same amount will be available for transfer to surplus whether the amortization is made through Account 505 or Account 537.

As petitioners recognize (Br. 42), after an extended discussion (Br. 26-29), this is not a rate case (2 R. 514-516), and under the Supreme Court decision in *American Telephone & Telegraph Company v. United States*, 299 U. S. 232, in this proceeding:

The label is unimportant, whether depreciation or amortization, if the substance of allowance is adequately preserved (p. 244).

See also *Norfolk & Western Ry. v. United States* (W. D. Va., 1931), 52 F. (2d) 967, 970, *aff'd.*, 287 U. S. 134 (1932); *State Corporation Comm. of Kansas v. Wichita Gas Co.*, 290 U. S. 561, 569 (1934); *United States v. Los Angeles & S. L. Ry.*, 273 U. S. 299 (1927); and *Northwestern Electric Company v. Federal Power Commission* (C. C. A. 9th, 1942), 125 F. (2d) 882, 886, for cases showing, *inter alia*, irrelevancy of rate case considerations in an accounting case such as the one at bar.

Petitioners further contend that the Commission erred in requiring the amortization of the excess over original cost if the "fair value" of Pacific's properties as of December 31, 1940, supports the book cost (Pet. Br. 27, 28, 31). This contention was first rejected in *Northwestern Electric Company v. Federal Power Commission*, 125 F. (2d) 882, 886, and again in *Northwestern Electric Company v. Federal Power Commission*, 134 F. (2d) 740, 744, this Court saying "The arguments that the actual values of petitioner's business has been ignored by the Commission are not pertinent. On the first review we approved the system of accounts prescribed, and we will not revive the arguments. * * * [the actual values] have no bearing on the 'original cost' theory of the system of accounts."

Moreover, assuming its relevancy, the "fair value" evidence offered here was not competent or material to show that the "intangibles" paid for with the

\$2,741,591.66 are “supported by the present fair value of the property assembled as a whole” (Pet. Br. 27). Pacific’s counsel stated the relevancy of the “fair value” evidence as follows (1 R. 204):

It has no relation to those estimates or determinations [of the excess over original cost and original cost] whatsoever, except in the sense that it relates to the same property. *I mean, it does not undertake to have any definite relation to the original costs or purchase costs, or any other kind of costs; it is a straight presentation of the value of this property as of December 31, 1940 * * ** [Italics supplied.]

The “fair value” as of December 31, 1940, therefore is not competent or material to show that the intangibles purchased twenty to thirty-three years ago “cannot disappear” (Pet. Br. 21); that their “value” increases (Pet. Br. 21); that they have not disappeared; that they have a certain value today; or that they have “merely [lost] their identity by fusion with the system and situation of which they have become inseparable parts” (Pet. Br. 21, 22).

Petitioners’ statements, in their brief, that intangibles cannot disappear; have not disappeared; have increased in value; have merely lost their identity; and have fused with the tangible property, are unfounded and gratuitous assumptions and are without support in the record as is indicated by the absence of record references in petitioners’ brief (Pet. Br. 21, 22, 26, 27, 31). On the contrary intangibles such as those involved here, tend to and do disappear as witness the

street railways of which the same was said as petitioners say here of the electric industry (2 R. 506). There is no asset, with the possible exception of land, which is not subject to declining value and complete disappearance as a result of economic and other forces. In view of the fact that the properties purchased are virtually no longer in existence (3 R., Ex. 15, p. 118; Ex. 17, Rev. Statement B, p. 37), if the intangibles had fused with the tangible property and become an integral part thereof as contended by petitioners (Pet. Br. 22), then such intangibles disappeared with the property, which has been substantially, if not entirely depreciated,³⁴ and the excess cost applicable to them should likewise have been substantially, if not entirely amortized. *Accord*, Pet. Br. 22; *Southern Colorado Power Company*, — S. E. C. —; S. E. C. File Nos. 54-55 and 59-51, Holding Company Act of 1935, Release No. 4501, August 24, 1943, pp. 25-26; *Ogden Corporation*, — S. E. C. —; S. E. C. File No. 54-69, Holding Company Act of 1935, Release No. 4307, May 21, 1943, p. 23.

Petitioners also contend that the requirement that Pacific amortize the intangibles is an adjudication that the common stock of the company is not legally paid-up; that such a question is a judicial one to be determined by the courts and the law of the state of incorporation; and that the Commission has thus assumed judicial powers (Pet. Br. 41-42).

³⁴ The average life of steam-electric property is 31 years and of hydro-electric property, 40 years. *U. S. Treasury Department, Bureau of Internal Revenue*, Bulletin "F," Revised January 1942, p. 61.

These contentions were rejected by this Court in the second *Northwestern* case, *supra*, 134 F. (2d) 740, 744:

The act, however, authorizes the Commission to "determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited" 16 U. S. C. A. § 825 (a). The Commission was authorized to do what it did, regardless of whether the effects mentioned by petitioner result.

Finally, petitioners complain that the order confiscates their property because "earnings or surplus which would otherwise be available for the payment of dividends are used" for the amortization of the intangibles (Pet. Br. 31).

The same contention was disposed of in *Northwestern Electric Company v. Federal Power Commission*, 134 F. (2d) 740, 744-745, this Court saying:

Finally, it is argued that the order deprives petitioner of its property without due process of law. We previously held that petitioner was not deprived of the value of its properties without due process of law, 125 F. (2d) 882, 886. However, it is now said that the effect of the order is to make American again pay for stock which it bought on the open market in good faith, since the earnings became frozen in the capital of the corporation. In addition, computed at the present earning rate, it will be between ten and twenty years before the common stock will again be in the position so that dividends can be paid thereon. It is said, therefore, that while such an order might be valid as against the promoters, if they still held the

stock, it is highly unfair as against American, and that such order deprives it of the value of the stock and its normal right to dividends.

While it might be said that American is not entitled to the earnings until declared as dividends, and therefore nothing has been taken from it, that view disregards realities. It is certainly possible, if not probable, that the market value of the stock would decrease, probably substantially, if no dividends can be paid thereon for ten years or more. However, in *Kansas City So. Ry. v. United States*, 231 U. S. 423, 455, 34 S. Ct. 125, 58 L. Ed. 296, 52 L. R. A., N. S., 1, it was held that a railroad could be compelled to charge a disputed item against its earnings. The order involved here requires the same thing, and adopts the principle approved in the cited case. If a company can be compelled to charge an item against earnings, for one year, we see no reason why it cannot be compelled to make the same kind of entries for succeeding years.

If the result of the Commission's order is to divert earnings which would otherwise be available for dividends, such result flows from the legitimate exercise of the Commission's accounting authority. *Kansas City So. Ry. v. United States*, 231 U. S. 423, 453, 455.

CONCLUSION

In conclusion it is respectfully submitted that the Commission's order is fully supported by substantial and uncontradicted evidence³⁵ of expert accountants

³⁵ *Montana Power Co. v. Federal Power Commission* (C. C. A. 9th, 1940), 112 F. (2d) 371, 374.

and accords with established principles of correct accounting. In reviewing such order, the Court is not "at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers"³⁶ and "so long as there is warrant in the record for the judgment of the expert body it must stand."³⁷ Since the Commission's order is not "so entirely at odds with fundamental principles of correct accounting"³⁸ nor "so arbitrary and outrageous"³⁹ as to be the "expression of a whim rather than an exercise of judgment"⁴⁰ it should be affirmed.

Respectfully submitted.

CHARLES V. SHANNON,
General Counsel,

REUBEN GOLDBERG,
Senior Attorney,

Counsel for Respondent, Federal Power Commission.

SEPTEMBER 1943.

³⁶ *American Tel. & Tel. Co. v. United States*, 299 U. S. 232, 236 (1936).

³⁷ *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 145-146.

³⁸ *Kansas City S. R. Co. v. United States*, 231 U. S. 423, 444 (1913).

³⁹ *Norfolk & Western Ry. v. United States*, 287 U. S. 134, 143 (1932).

⁴⁰ *American Tel. & Tel. Co. v. United States*, 299 U. S. 232, 237 (1936).

APPENDIX A

ANALYSIS OF THE \$2,741,591.66 BY YEARS AND ACQUISITIONS

ACQUISITION No	NAME OF COMPANY DIRECTLY CONVEYING PROPERTY TO PACIFIC	DATE OF ACQUISITION	AMOUNT ESTABLISHED IN ACCOUNT NO. 5 APPLICABLE TO THE ACQUISITION (dollars)	% OF TOTAL	RECORD REFERENCES
1	Columbia Power & Light Company	1909 or 1910	\$1,321,601.45	48.4	3 R., Ex. 17, Rev. Statement B, p. 17, 1R. 168; 2R. 440
	Yukima-Paseo Power Company				3 R., Ex. 17, Rev. Statement B, p. 18, 1R. 168, 2R. 440
	Astoria Electric Company				3 R., Ex. 17, Rev. Statement B, p. 18, 1R. 168, 2R. 440
2.	Husum Power Company	1911	23,759.81	0.8	3 R., Ex. 17, Rev. Statement B, p. 21, 1R. 170, 2R. 440
3.	The Prosser Power Company and Prosser Water Company	1911	5,738.56	0.2	3 R., Ex. 17, Rev. Statement B, p. 21, 1R. 170-171; 2R. 440
4	The Khekatat Light & Power Company	1911	1,080.35	-	3 R., Ex. 17, Rev. Statement B, p. 26, 2R. 440
5.	Hood River Light & Power Company	1911	164,979.19	6.0	3 R., Ex. 17, Rev. Statement B, p. 26, 1R. 171, 2R. 440
6	Tacannon Power Company	1911	39,260.64	1.4	3 R., Ex. 17, Rev. Statement B, p. 27, 1R. 171; 2R. 440
7.	Dayton Electric Company	1911	40,648.17	1.5	3 R., Ex. 17, Rev. Statement B, p. 28, 1R. 171, 2R. 440
8.	Waitsburg Electric Light Company	1911	45,873.41	-0.2	3 R., Ex. 17, Rev. Statement B, p. 29, 2R. 440
9.	Reservation Electric Company	1911	9,158.42	0.3	3 R., Ex. 17, Rev. Statement B, p. 29, 2R. 440
	Sub-Total 1909-1911		\$1,600,353.18	58.0	
10.	Hydro-Electric Company	1915	115,718.63	4.2	3 R., Ex. 17, Rev. Statement B, p. 31, 1R. 172-173, 2R. 440
11.	Seaside Light and Power Company	1916	21,683.76	0.8	3 R., Ex. 17, Rev. Statement B, p. 32, 1R. 174; 2R. 440
12.	Gearhart Park Company	1916	77.60	-	3 R., Ex. 17, Rev. Statement B, p. 33, 2R. 440
	Sub-Total 1915-1916		\$137,479.99	5.0	
13.	Indian Power & Light Company	1923 ¹	1,085,512.23	39.5	3 R., Ex. 17, Rev. Statement B, pp. 37-41, 2R. 440
14	Cannon Beach Electric Company	1925	1,512.62	0.6	3 R., Ex. 17, Rev. Statement B, p. 34, 1R. 174, 2R. 440
	Sub-Total 1923-1925		\$1,087,024.85	40.1	
15	Concull Power & Light Company	1935	12.26	-	3 R., Ex. 17, Rev. Statement B, p. 14, 2R. 440
	Sub-Total 1935		\$12.26		
	Adjustments Applicable to Acquisitions:				
	Gross Plant Additions		14,177.27	0.5	2R. 440
	Adjustments by Commissioners' Staffs Accepted by Pacific		97,455.89	-3.6	2R. 440
	Total Acquisitions Adjustments		\$2,741,591.66	100.0	2R. 440

¹ The property company was inactive before the date of acquisition. Some of the property was in existence for back as 1889 (1 R. 120). Although the transfer to Pacific by Indian was made in 1923, the property had been acquired by Indian in 1923. The acquisition adjustment is for the 1923 transfer since they were only book transfers as indicated from the 1923 transfer which was left on file.

The figures are taken from column 7 of the exhibit having no number which is included in Volume 1 of the photo record following Exhibit 17.

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APPENDIX B

COMMISSION ORDERS AUTHORIZING THE AMORTIZATION OF AMOUNTS CLASSIFIED IN ACCOUNT 100.5, ELECTRIC PLANT ACQUISITION ADJUSTMENTS

<i>Name of Company</i>	<i>Docket No</i>	<i>Date of Order</i>
Georgia Power Company	IT-5682	Feb 27, 1941
New Mexico Power Company	-	June 3, 1941
Iowa Union Electric Company	IT-5685	Nov. 6, 1941
Northwestern Wisconsin Electric Company	IT-5716	Nov. 12, 1941
Wisconsin Central Utilities Company	IT-5717	Nov. 12, 1941
Potomac Electric Power Company	IT-5728	Dec 30, 1941
Blackstone Valley Gas & Electric Company	-	Jan. 13, 1942
El Paso Electric Company (Texas)	IT-5733	Jan. 20, 1942
Northwestern Illinois Utilities	IT-5759	Jan. 27, 1942
Missouri Utilities Company	IT-5768	Feb. 3, 1942
Pennsylvania Electric Company	IT-5760	Feb. 18, 1942
Yamhill Electric Company	-	May 19, 1942
Duke Power Company	-	June 2, 1942
Kansas City Power & Light Company	IT-5737	June 12, 1942
Portland General Electric Company	IT-5779	July 31, 1942
Missouri Service Company	IT-5778	Aug 11, 1942
Gulf States Utilities Company Re Baton Rouge Electric Com- pany	IT-5787	Aug 18, 1942
Wisconsin Michigan Power Company	IT-5722	Oct 6, 1942
Montana-Dakota Utilities Company	-	Oct 13, 1942
Benton County Utilities Corporation	IT 5744	Oct 20, 1942
Indiana Service Corporation	-	Jan. 5, 1943
Central Vermont Public Service Corporation	IT-5807	Jan. 5, 1943
Cincinnati Gas & Electric Company, The	-	Jan 13, 1943
Delaware Power & Light Company	IT-5810	Jan 13, 1943
Southern California Edison Company, Ltd	-	Jan 19, 1943
Sioux City Gas and Electric Company	IT-5809	Apr 20, 1943
Idaho Power Company	IT-5827	May 18, 1943
West Virginia Light, Heat and Power Company	IT-5823	June 9, 1943
Two State Gas & Electric Company, The	IT-5843	Aug 3, 1943
Gulf Power Company	-	Sept 7, 1943
Kentucky and West Virginia Power Company, Inc.	IT-5752	Sept 7, 1943
Virginia Public Service Company	-	Sept 21, 1943
Whirling Electric Company	-	Sept 21, 1943

APPENDIX C

PACIFIC POWER & LIGHT COMPANY

INCOME ACCOUNT FOR THE 12 MONTHS ENDED DECEMBER 31, 1940
REFLECTING THE AMORTIZATION OF ACCOUNT 100.5 THROUGH ACCOUNT 505 AND ACCOUNT 537

	AMORTIZATION THROUGH ACCOUNT 505	AMORTIZATION THROUGH ACCOUNT 537	DIFFERENCE \$ -
Operating Revenues	85,789,684.01	85,789,684.01	-
Operating Revenue Deductions:			
Operating expenses	2,732,522.50	2,732,522.50	-
Property retirement reserve appropriation	600,000.00	600,000.00	-
Amortization of limited-term utility investment	134.01	134.01	-
Amortization of utility plant acquisition adjustments	274,159.17	-	274,159.17
Taxes	883,103.90	883,103.90	-
Total operating revenue deductions	4,489,919.58	4,215,760.41	274,159.17
Net operating revenues	1,299,764.43	1,573,923.60	274,159.17
Income from Utility Plant Leased to Others	221,301.80	221,301.80	-
Utility operating income	1,521,066.23	1,795,225.40	274,159.17
Other Income:			
Revenues from lease of other physical property	536.00	536.00	-
Interest revenues	348,245.00	348,245.00	-
Miscellaneous nonoperating revenues	1,083.67	1,083.67	-
Nonoperating revenue (deductions)	(10,434.46)	(10,434.46)	-
Total other income	339,430.21	339,430.21	-
Gross income	1,860,496.44	2,134,655.61	274,159.17
Income Deductions:			
Interest on long-term debt	1,025,000.00	1,025,000.00	-
Amortization of debt discount and expense	8,132.40	8,132.40	-
Interest on debt to associated companies	167,670.00	167,670.00	-
Other interest charges	21,441.14	21,441.14	-
Interest charged to construction (credit)	(429.80)	(429.80)	-
Miscellaneous amortization	-	274,159.17	(274,159.17)
Miscellaneous income deductions	59,262.56	59,262.56	-
Total income deductions	1,281,076.30	1,355,233.47	(274,159.17)
Net income transferred to earned surplus	\$579,420.14	\$579,420.14	-

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1955 71 72 73

1955 71 72 73 74

1955 71 72 73 74 75

APPENDIX D

Excerpts from Federal Power Act (16 U. S. C. A., Secs. 791 et seq.):

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SECTION 208. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such

periods such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to

grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(c) The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, insofar as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission.

SECTION 304. (a) Every licensee and every public utility shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this Act. The Commission may prescribe the manner and form in which such reports shall be made, and require from such persons specific answers to all questions upon which the Commission may need information. The Commission may require that such reports shall include, among other things, full information as to assets and liabilities, capitalization, net investment, and reduction thereof, gross receipts, interest due and paid, depreciation, and other reserves, cost of project and other facilities, cost of maintenance and operation of the project and other facilities, cost of renewals and replacement of the project works and other facilities, depreciation, generation, transmission, distribution, delivery, use, and sale of electric energy. The Commission may require any such person to make ade-

quate provision for currently determining such costs and other facts. Such reports shall be made under oath unless the Commission otherwise specifies.

(b) It shall be unlawful for any person willfully to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, memorandum, record, or account required to be made, filed, or kept under this Act, or any rule, regulation, or order thereunder.

SECTION 309. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

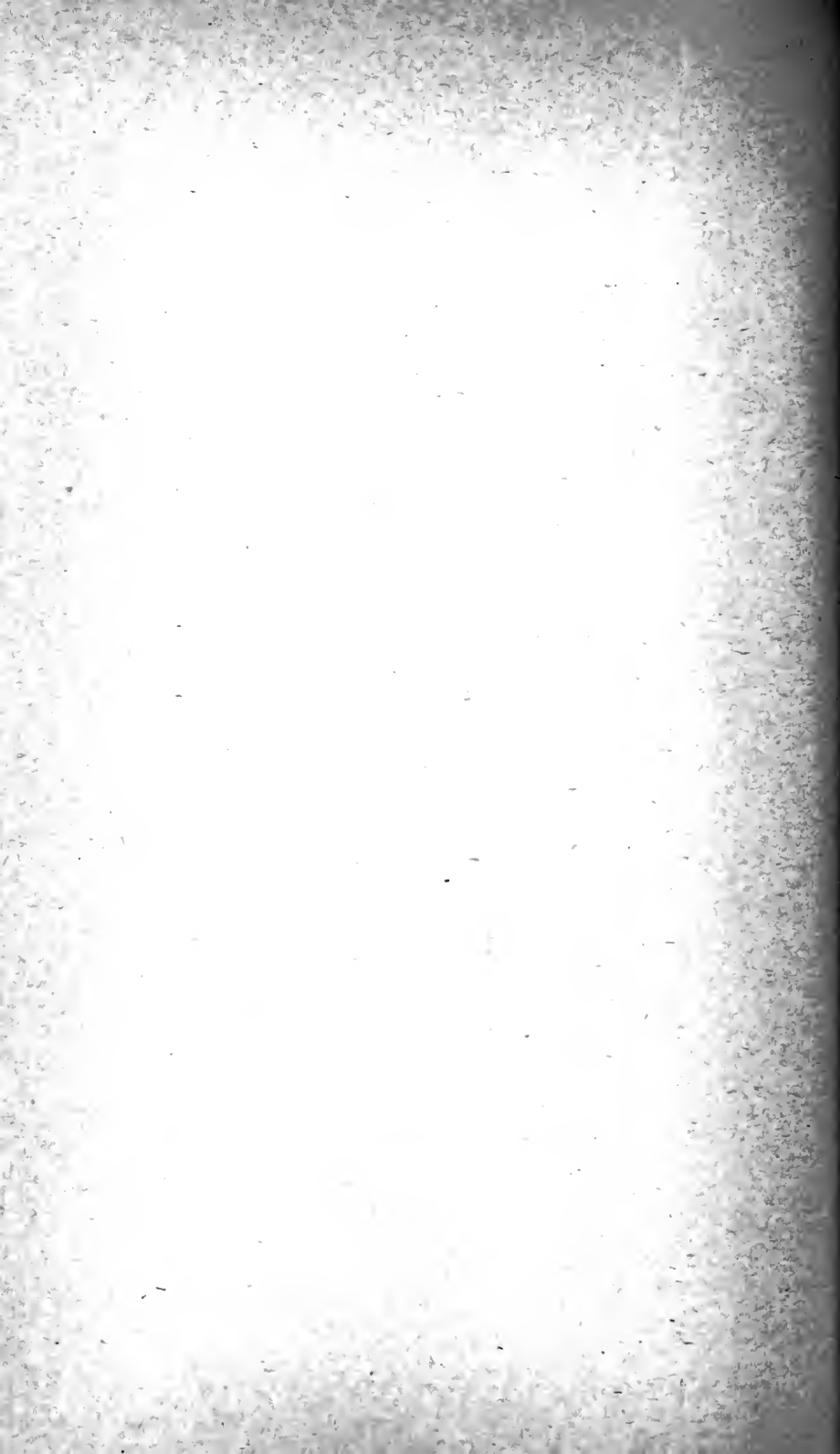
SECTION 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State,

municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

No. 10386.

PACIFIC POWER & LIGHT COMPANY and AMERICAN
POWER & LIGHT COMPANY,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF FOR PETITIONERS.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC POWER & LIGHT COMPANY and
AMERICAN POWER & LIGHT COMPANY,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

No. 10386.

REPLY BRIEF FOR PETITIONERS.

Introductory Statement.

The grounds on which the Commission attempts, without discussing the question whether it controls the fundamental books of account of Pacific, to rebut the contentions made by the Petitioners in their main brief may be summarized as follows:

(1) That with respect to the item of \$4,121,981.41 classified by the Commission in Account 107, the Commission's authority to dispose of such item as distinguished from the mere method of disposition is not properly in issue (Res. Br. 16);

(2) That if the entire question of disposition is in issue, (a) it is disposed of by the decisions of this Court in *Northwestern Electric Company v. Federal Power Commission*, 125 Fed. (2nd) 882 and *Northwestern Electric Company v. Federal Power Commission*, 134 Fed. (2nd)

740 (Res. Br. 16-19) and (b) is supported by the evidence in this case (Res. Br. 13-16);

(3) That the Commission's amortization of the \$2,741,591.66 classified in Account 100.5 is supported by substantial evidence (Res. Br. 19-30), and the Commission's authority to prescribe the amortization of that item is fully sustained by *American Telephone & Telegraph Company v. United States*, 299 U. S. 232 (Res. Br. 30-31);

(4) That Petitioners' objection to the amortization of the \$2,741,591.66 through Account 537 instead of Account 505 has been waived for failure specifically to include it in Petitioners' applications for rehearing or in Petitioners' application for review (Res. Br. 31); that the evidence offered by the Petitioners to show that the intangible value represented by the \$2,741,591.66 has not disappeared was incompetent for that purpose; that the record shows that the properties to which this intangible value related have disappeared (Res. Br. 33-35); and that *Northwestern Electric Company v. Federal Power Commission*, 134 Fed. (2d) 740, disposes of Petitioners' contentions that the Commission cannot require the amortization of the \$2,741,591.66 because (a) such a requirement is an adjudication that the common stock of the Company is not legally paid up and therefore an assumption of the judicial powers rightfully lodged in the courts of the state of incorporation, and because (b) such a disposition of the \$2,741,591.66 is a deprivation of Petitioners' property without due process of law in that the order purports to divert to amortization of intangibles earnings or surplus which would otherwise be available for the payment of dividends (Res. Br. 35-37).

POINT I.

The entire question of disposition of the \$4,121,981.41, not merely the method of disposition, is in issue here.

On page 16 of its brief, Respondent states:

“Moreover, since all amounts transferred to Account 107 become subject to disposition ‘as the Commission may approve or direct’, the Commission’s authority to dispose of the ‘write-up’, as distinguished from the method of such disposition, is not properly in issue. *American Tel. & Tel. Co. v. United States*, 299 U. S. 232, 240.”

The contention thus made that Petitioners have acquiesced in the classification of \$4,121,981.41 in Account 107 and that Account 107 by its terms gives the Commission authority to require a write-off obviously is without merit unless related only to memorandum accounts kept solely for the information of the Commission. In the first place, the system of accounts in itself confers no authority on the Commission, which must find its power in the statute. Furthermore, the *American Telephone & Telegraph* case not only does not support the Respondent’s position in this respect but, on the contrary, squarely holds that an account such as Account 107 cannot constitutionally be construed to require a mandatory or arbitrary write-off of amounts classified therein.

Account 107 purports to represent the difference between book value and cost to the accounting utility. In the *American Telephone & Telegraph Company* case, the Court held that, although such increments may be segregated by classification in separate accounts such as Account 107, no write-off can be justified where the increment represents

“a true increment of value.” Therefore, it is clearly established that classification of an amount in Account 107 and acceptance of such classification by the Petitioners here does not automatically determine that this amount may be ordered written off by the Commission. On the contrary, the *American Telephone & Telegraph Company* case indicates that the write-off of such an amount is proper only if the evidence establishes that the increment segregated is a fictitious or a paper increment and does not represent “the difference between present value and original cost.” Moreover, any consideration of a method for writing off book values fully supported by existing asset values inherently raises the whole question of disposition and the taking of property without due process.

POINT II.

The issues in this case with respect to the disposition of the \$4,121,981.41 have not been finally determined by the decisions of this court in the *Northwestern* case.

On pages 16 through 19 of its brief, Respondent makes the contention that the authority of the Commission to require the disposition of the \$4,121,981.41 which it has ordered is settled by the decisions of this Court in the *Northwestern Electric Company* case.

The question of disposition of amounts reclassified in Account 107 of the Commission's system of accounts was not settled by this Court in the *Northwestern* case. Upon the first *Northwestern* review the Commission, in brief and oral argument, contended that:

“Inasmuch as the Commission has granted a rehearing and has not passed upon the questions raised therein, the administrative process has not been com-

pleted. The question of the disposition of \$3,500,000, therefore, is not properly before the Court."

And it was successful in its endeavor to avoid judicial consideration of the *disposition* question. In its opinion this Court said: "With respect to the common stock item a rehearing of the Commission's order was granted but not decided. Until decided there is no order to review here." On the second review in the *Northwestern* case, this Court declined to consider whether the Commission was authorized to order a write-off of book values in excess of original cost but supported by existing values, upon the ground that the Court had approved the system of accounts prescribed, and held that questions of value were not pertinent to the issues of *reclassification*. *Stare decisis* is inapplicable here; no proposition of law can be said to have been established when it appears that it was not in the mind of the Court when the decision was made. *Woodruff v. Parham*, 8 Wall. (U. S.) 123.

Because the Commission's contentions in this case are similar to the contentions made by it in opposing the granting of certiorari in the *Northwestern* case, we have included our reply brief before the Supreme Court in that case as Appendix A hereto. (Certiorari was granted in the *Northwestern* case on October 10, 1943.)

Furthermore, the situation here is distinctly different from that which was present in the *Northwestern* decisions. In the *Northwestern* case the interests of American Power & Light Company were ignored and the application of "company cost" was insisted upon because it resulted in a lower book value, but in this case, where the use of cost to American Power & Light Company results in a lower book value, "company cost" is ignored and the corporate entity of the accounting company is disregarded. The Commission claims

that the *Northwestern* decisions are decisive. If so, it must apply the *Northwestern* case principles applicable to the determination of "company cost" which would require substantial proof that the company received no value for its stock. It may not substitute for substantial proof of "company cost" the supposition that there has been unfair dealing between affiliates requiring the application of system cost. There is no proof in this case which makes the *Northwestern* case applicable; the corporate set-up and the nature of the transactions are entirely dissimilar.

In the present case, it is unquestioned that properties were transferred to Pacific in exchange for the stock and securities issued. The decision of the Commission in ordering that \$4,121,981.41 of the recorded cost of these properties to Pacific be regarded as a write-up for the purpose of the system of accounts is based solely on the refusal of the Commission to recognize an inter-company transaction as establishing the cost of properties. The Commission did not even go into the question of what the value of the properties was or whether their cost was established in good faith by the respective Boards of Directors of Pacific Power & Light Company and American Power & Light Company. It did not determine whether a valid sale had been consummated between separate corporate entities, or consider either cost or value as determinable at the time. In fact, it excluded all consideration of state laws, although the transactions which it would recast took place long prior to enactment of the statute from which it derives a limited authority. It merely took the position that the "system cost" to American Power & Light Company, when it purchased the properties from outside of the affiliation, determined the cost for any member of the affiliated group for the purpose of its system of accounts (R. 428).

Even if it be accepted for the sake of argument that fundamentally the same issues are present here as were present in the *Northwestern* case, the ruling of the *Northwestern* case cannot yet be accepted as the settled law, since a petition for certiorari in that case has been granted by the Supreme Court. It is, therefore, submitted that the arguments of the Petitioners set forth in their main brief with respect to the disposition of the \$4,121,981.41 should be considered on the merits by this Court and that this Court should reconsider the propriety of its decision in the *Northwestern* case in view of the inequity of broadly applying the rules there enunciated by this Court to situations such as that here involved.

Further, in its first decision in the *Northwestern* case this Court said:

“The system of accounts takes nothing from petitioner. Petitioner may keep such other accounts as it desires. The present regulation only requires a particular system of accounts to be kept, not that other systems shall not be kept.”

In Petitioners' application for rehearing, on the second review in the *Northwestern* case, it was pointed out that the disposition then under consideration could not be given effect and the order directing it became meaningless unless taken as controlling the public utility's fundamental and general corporate books of account. This issue must be met and decided in this case, and if the Court considers that the provisions of the Commission's system of accounts require a write-off of the amount thus established in Account 107, it must be held that this requirement is limited to the Commission's system of accounts and does not affect the fundamental books of account of Pacific.

POINT III.

The Commission's order for the amortization of the \$2,741,591.66 classified in Account 100.5 is not fully supported by substantial evidence and is invalid under the *American Telephone & Telegraph Company* case.

The Respondent's arguments that its order requiring the disposition of the \$2,741,591.66 is fully supported by substantial evidence are peculiarly unconvincing.

In the first place, the Commission asserts that the record shows both Petitioners' and Respondent's witnesses agreeing that the \$2,741,591.66 was paid for intangibles, and that these intangibles are rooted in and based upon the purchaser's evaluation of the prospective earning power of the situation. On the contrary, the Commission has referred to no part of the record which contains such an admission upon the part of Pacific's witnesses. It is true that the Commission's staff attempted to put such an admission into the mouth of Petitioners' witness Will T. Neill by asking the question "And they all tie in, do they not, with an evaluation the prospective purchaser makes of the prospective earning power of the situation?" (R. 393). Mr. Neill's answer was "I think they are all found in the situation. In any acquisition there are potential values coming about by tying a property in with others to get greater efficiency in the use of the whole system and a better chance for development or rapid growth" (R. 393). It should be noted that Mr. Neill's statement was that the intangibles were found "*in the situation,*" not in the "*prospective earning power of the situation.*" This statement is not an expression of agreement that intangibles are rooted in and based upon the purchaser's evaluation of the

prospective earning power of the situation, but on the contrary supports the Petitioners' contention on pages 21, 22, 26 of their main brief that these intangible values are related to the physical projects, the physical characteristics of the area covered and the integration of utility properties into efficient systems. The proposition that all intangible values are simply estimates of prospective earnings is merely the theory of the Commission's staff to which its members testified when called upon as witnesses.

The Commission's case rests entirely upon the opinions of its own staff members. To label such opinions as substantial evidence does violence to due process, especially when the opinions are rendered by accountants who could not and did not qualify as experts capable of rendering a judgment as to the propriety or necessity of amortizing the properties and business with which the so-called intangibles are so inextricably associated. In so far as regulation is concerned, this is a problem for skilled technicians and engineers and so far as business considerations are involved, it requires the judgment of men skilled in the operation of such a system under comparable circumstances. The Commission's witnesses qualify on neither basis.

Aside from the Commission staff's own opinion as to the nature of the intangibles and the propriety of disposing of them in the manner in which the Commission has directed, the Commission has failed to point to any substantial evidence in support of its order. The most it can say with respect to the practice of the Bureau of Internal Revenue in accounting for intangibles for income tax purposes is that it is not bound by the accounting principles followed by the Bureau. It has practically conceded that a write-off of intangibles is not required by accounting prin-

ciples, although not prohibited if there are other good reasons to support it (Res. Br. 27).

The Commission attempts to substitute for the lack of evidence in the record the practice of the Interstate Commerce Commission of approving purchases of property, where the excess of purchase cost over cost to the seller represents a payment for intangibles, only upon the condition that the amount of intangibles be amortized or written off at once (Res. Br. 28). These cases do not supply the deficiency in the record for three reasons:

1. Under the rule laid down in the *American Telephone & Telegraph Company* case the propriety of a write-off must be determined upon the evidentiary circumstances in the particular case.

2. In the Commission decisions cited, the Interstate Commerce Commission was not imposing an amortization requirement retroactively. A condition of that Commission's permission to the carrier to acquire the property was that the amounts paid for intangibles be amortized. Knowing this in advance, the carrier could go through with the purchase or reject it. On the other hand, Pacific paid for its properties, tangible and intangible, many years ago and subject to no such conditions. To require Pacific now to write-off such amounts as may be deemed to have been paid for intangibles without any evidence that such intangibles have disappeared is a deprivation of the property rights of Pacific and its stockholders.

3. The Commission cites no court decision sustaining the authority of the Interstate Commerce Commission (a regulatory body which has much more comprehensive jurisdiction over carriers than the Federal Power Commis-

sion has over utilities), or of any other regulatory body, to impose any such amortization conditions upon its approval of a property purchase. A similar condition which the Public Service Commission of the State of New York sought to impose was declared unconstitutional by the Court of Appeals of the State of New York in *People ex rel. Iroquois Gas Corp. v. Public Service Commission*, 264 N. Y. 17. And in *Atlanta, B. & C. R. Co. v. U. S.*, 296 U. S. 33, which seems to be the only case involving the power of the Interstate Commerce Commission to apply its accounting precepts to the purchase of a railway property, book value was determined by the court only after *consideration of the fair value* of the property.

POINT IV.

Respondent's arguments do not dispose of Petitioners' objections to the Commission's amortization of intangibles.

The Respondent, having failed in its attempt to show that its amortization order is supported by substantial evidence, attempts to dispose in rather perfunctory fashion of several of the valid objections made to its order in Petitioners' main brief.

Respondent first contends that Petitioners cannot complain that the order requires amortization of the \$2,741,591.66 through Account 537 rather than Account 505 because this objection was not in Petitioners' application for rehearing or in the petition for review. In answer to this, it is sufficient to mention that both the applications for rehearing (R. 68-69, 76-77) and the petition for review (R. 102-105) objected generally to the amortization order as an

unlawful taking of property without due process of law. Since the whole includes all of its parts, this objection clearly covers Petitioners' contention that the particular feature of the order which requires the write-off to be made through Account 537 is an unlawful deprivation of Petitioners' rights and justifies the pointing out of this particular feature as one of the many reasons why the order as a whole is invalid.

In so far as Respondent contends that amortization through Account 537 rather than Account 505 does not involve any deprivation or confiscation of property on the ground that this is not a rate case and the final amount of income available for surplus is not affected (R. 32), it ignores the obvious fact that by making a distinction between Accounts 505 and 537 in its system of accounts and by ordering the amortization of the \$2,741,591.66 here involved through Account 537, it is prejudging the rate case issues without going into all of the factors necessary to a rate case decision. In all events, since the amount involved represents a legitimate investment, it clearly is confiscatory to require the investor to bear the cost of its assumed disappearance in service instead of requiring that it be charged to the customers in whose behalf the investment is being used up.

Respondent further contends that Petitioners cannot complain of the Commission's exclusion of evidence of the fair value of Pacific's property as of December 31, 1940, relying mainly on the decisions of this Court in the *Northwestern Electric Company* case. This argument is erroneous on two grounds:

First, as Petitioners have demonstrated, the only evidence in the record on which the Commission's amortization order can ultimately be based is the opinion testimony

of its own staff that intangible values tend to disappear and may have disappeared. Any weight to which this opinion testimony might be entitled is thoroughly dissipated by the Commission's refusal to permit the introduction of evidence which would show that the fair value of Pacific's property is sufficient to include the full book value of the intangibles.

Second, the opinion of the United States Supreme Court in the *American Telephone & Telegraph Company* case clearly states that amounts of company cost in excess of original cost may properly be segregated under a system of accounts, but that such amounts may not be written off if they represent "a true increment of value", clearly indicating that evidence of present fair value is not only admissible, but a controlling factor in a case such as is here present.

As has already been pointed out, the factual situation in the *Northwestern Electric Company* case was far different from that here involved with respect to the items classified in Account 107 and the *Northwestern* case did not deal at all with the disposition of amounts classified in Account 100.5. Even if this Court is sustained in holding in the *Northwestern* case that present fair value had no bearing on the proper disposition of amounts classified in Account 107 and even if the factual situation in that case with respect to amounts classified in Account 107 were not different from that involved here, the *Northwestern* case would form no precedent applicable to the disposition of items in Account 100.5. Thus, even if this Court's decision in the *Northwestern* case is upheld as proper, in the proceedings now pending before the United States Supreme Court, with respect to the disposition of items in Account 107, the fact still remains that items in Account 100.5 represent *bona fide* actual cost to a utility system on purchases

from outside the affiliation which may be segregated for scrutiny but cannot be disposed of without substantial evidence that they are unsupported by existing asset values.

Respondent, apparently realizing that the *Northwestern* case is not controlling with respect to the disposition of items classified in Account 100.5, makes a further contention that the fair value of the properties, tangible and intangible, as of December 31, 1940, is not competent or material to show that intangibles purchased twenty to thirty-three years ago cannot disappear or have not disappeared. On the contrary, it is submitted that there is no more practical way of showing that these intangibles have not disappeared than by showing that they, and Pacific's properties as a whole, have a value today in excess of their book value.

Respondent attempts to bolster the opinion testimony of its own staff by quoting Petitioners' statements that the intangibles have become fused with the system and situation of which they have become inseparable parts (Res. Br. 34) and that the \$2,741,591.66 should be retained in Account 100.5 until the "complete retirement or disposition of the respective systems to which the components of this total respectively apply; and at such time or times to remove from Account 100.5 so much thereof as pertains to the system acquisitions then retired or disposed of" (Res. Br. 21-25) and by further contending that the record shows that the original properties purchased are virtually no longer in existence (Res. Br. 19, 35).

In the first place, it should be noted that the Petitioners proposed to write-off the amounts classified in Account 100.5 when the respective *systems* to which they relate are abandoned or retired, whereas the Respondent attempts to twist this statement to mean that the intangibles should be written off as parts of the *particular plants and transmission lines composing that system* are retired and replaced.

Secondly, the values realized in the acquisition and integration of the acquired properties cannot be related or segregated to individual items such as poles, meters, generators, etc. A business enterprise does not consist merely of an aggregation of physical (or statistical) items. Its values are inherent in the efficiency, economy, location and service value of the system and its operations. Since this is the yardstick which must always be applied in valuing a business enterprise, the addition to and improvement of its physical properties, instead of terminating the life of the intangibles, would have the effect of enhancing such values inherent in the enterprise and extending their life.

Finally, the Respondent regards the remaining contentions of the Petitioners based on the Commission's unwarranted assumption of judicial powers and its confiscation of Petitioners' property rights through the diversion of earnings or surplus otherwise available for dividends as adjudicated by this Court in the *Northwestern* case (Res. Br. 35-37). These objections, Petitioners reassert, are vitally pertinent to the disposition herein ordered of both the \$4,121,981.41 classified in Account 107 and the \$2,741,591.66 classified in Account 100.5. We respectfully submit that they should be carefully considered by this Court, first, because the conclusions reached by this Court in the *Northwestern* case are not final, since certiorari has been granted by the Supreme Court in that case and, secondly, because even if such conclusions become final in the *Northwestern* case, this case is clearly distinguishable from the *Northwestern* case (1) in that the \$4,121,981.41 classified in Account 107 clearly represents company cost, although not the system cost, of assets actually received by the accounting utility, whereas in the *Northwestern* case the \$3,500,000 classified in Account 107 was found to be an amount written on the books for which no tangible asset was ever received,

and (2) in that this case deals with an amount of admitted legitimate cost classified in Account 100.5, whereas no such issue was involved in the *Northwestern* case.

Conclusion.

It is, therefore, submitted that the order of the Commission dated November 24, 1942 in so far as it directs the amortization or write-off of amounts classified in Account 100.5, Electric Plant Acquisition Adjustments, or Account 107, Electric Plant Adjustments, should be declared invalid and set aside, and that Section 301 (a) of the Federal Power Act, if deemed to authorize such order, should be declared unconstitutional and void, for the reasons cited in Petitioners' main brief.

Respectfully submitted,

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Appendix A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 195

NORTHWESTERN ELECTRIC COMPANY

and

AMERICAN POWER & LIGHT COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit
Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

Introductory Statement.

First of all, this is not a mere accounting case. The issues raised in our petition for certiorari, but ignored in the Commission's brief, deal primarily with considerations which are outside the accounting function. Indeed, the decision of the court below so gravely misconstrued Section 301(a) of the Federal Power Act as to hold, in effect, that the Federal Power Commission, by reason of authority as

to accounting alone, may exercise plenary power over the affairs of a locally regulated utility company, ousting the State courts of jurisdiction and nullifying their judgments. The ambit of the Commission's statutory authority has been grossly exceeded and the Commission's order "as applied to the facts before it and viewed in its entirety" produces a shockingly "arbitrary result". *Federal Power Commission v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 586.

Argument.

I.

The Commission's brief asserts that we attempt to argue all the questions which would be open if the Commission's original order were before this Court and relies primarily upon the plea of *res judicata*. The Commission cannot enter such a plea in this proceeding. Interpreting *its own order* before the lower court, it framed the issues to exclude the question of disposition from the scope of the lower court's first judgment; it presented and relied upon the claim that "the question of the disposition of \$3,500,000, therefore, is not properly before the court," and it is estopped from asserting that the judgment of the lower court on the first review determined that said amount of \$3,500,000 must be written out of the accounts of petitioner, Northwestern Electric Company.

The order which called the original hearing before the Commission only directed Northwestern to show cause why the Commission "should not find and determine by order that adjusting entries be made to bring the books of account in conformity with" a report prepared by the Commission's staff (R. 3). And that report had actually recommended that the amount of \$3,500,000 here in question "be

retained in Account 107, Electric Plant Adjustments, pending the submission to the Commission of a plan for its disposition" (R., Vol. III, Ex. 3, p. 29).

Northwestern's application to the Commission for rehearing (R., Vol. I, pp. 91-100) specifically urged that the question of disposition was outside of the scope of the Commission's order to show cause and the issues of the hearing and that the ordered disposition was without due process of law. The Commission's order on application for rehearing, dated January 21, 1941, directed that "a rehearing be held * * * for the purpose only of permitting the presentation of a plan of disposition of the amount of \$3,500,000 * * *." Northwestern filed with and served upon the Commission an application asserting that it was "unable to determine from the provisions of said order of January 21, 1941, whether the Commission intended thereby to provide or did provide that the issues of such rehearing include all questions appropriately related to the retention in or disposition from said Account 107 of the amount of \$3,500,000 and the manner and character of any disposition which may or should be ordered." (R., Vol. I, p. 122). The petition for review of the original order of the Commission, in assignments of error IX-10, 11, 12, X and XI, fully pleaded the invalidity of the action of the Commission in ordering disposition of said amount of \$3,500,000 and vigorously contended that this portion of the order must be set aside (R., Vol. I, pp. 115, 128-131).

In brief and oral argument the Commission contended that the issue of disposition was not before the court. And it was successful in its endeavor to avoid judicial consideration of the disposition question. In its opinion (R. 819), the lower court said: "With respect to the common-stock item a rehearing of the Commission's order was granted

but not decided. Until decided there is no order to review here. ¹*Fed. Power Comm'n v. Edison Co.*, 304 U. S. 375, 383." Thus, *by the lower court's own decision*, upon the first review, it was established as the law of the case that no phase of the question of disposition was then before that court.

The position now taken by the Commission is in direct conflict with its contentions, both in its brief and on oral argument, which led the lower court to hold that the question of disposition was not then (upon the first review) before that court. Among other things, the Commission's brief (pp. 44-49) then urged:

"On January 9, 1941, Petitioner filed an application for rehearing on the Commission's order of December 6, 1940 (R. 79). On January 21, 1941, the Commission ordered that a rehearing be held on February 10, 1941, 'for the purpose only of permitting the presentation of a plan of disposition of the amount of \$3,500,000 write-up which the Commission, in paragraph (2a) of its order of December 6, 1940, ordered Northwestern to make disposition of, * * *' (R. 113). On December 30, 1940, the Commission stayed that portion of its order which required the disposition of this amount 'pending an application for rehearing herein * * * and the decision of the Commission upon such application for rehearing' (R. 112). A rehearing was held on March 3 and 4, 1941, and an oral argument was had before the Commission sitting *en banc* on May 21, 1941. No order has yet been entered by the Commission as a result of the rehearing and its own stay of its order requiring disposition is still in effect.

¹ This was the case chiefly relied upon by the Commission in this connection; see p. 5, *infra*.

"Inasmuch as the Commission has granted a rehearing and has not passed upon the questions raised therein, the administrative process has not been completed. The question of the disposition of \$3,500,000, therefore, is not properly before the Court.

*"The decision of the Supreme Court in *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 381-383, is controlling here. * * **

*"It follows that the same reason which prevents the running of the time for taking the appeal, prevents this court from acquiring jurisdiction; i. e., because jurisdiction continues in the Commission to modify, reverse, or affirm its decision. Upon the filing of its appeal in this court—its petition for rehearing being then undisposed of—appellant occupied the anomalous position of asking the Commission for administrative relief, and at the same time asking the court for judicial relief from the anticipated decision of the Commission. * * **

"Finally, even if this court did have jurisdiction over the appeal, a situation would be presented calling for the exercise of judicial discretion to determine whether relief should be denied at this stage of the proceedings, until all possible administrative remedies had been exhausted; and in our opinion the appeal should be dismissed for that reason in any event. We have heretofore suggested that rehearings should be availed of by aggrieved persons both for their own protection, and in order to afford opportunity to the Commission to correct errors or to hear newly discovered evidence before appeal. This is not and should not be an arbitrary requirement. Whether a petition for rehearing should be filed in a particular case must be decided on the merits as each case arises. However, in our view, its use as an administrative remedy should not be discouraged, but instead should be encouraged—'not to supplant, but to supplement' appellate re-

view. * * * *Until the Commission has considered and acted upon such a petition, the administrative remedy of the aggrieved person cannot properly be said to have been exhausted, and resort to this court in such cases is, therefore, premature*" (emphasis supplied).

In the case of *American Tel. & Tel. Co. v. U. S.*, 299 U. S. 232, this Court held that the Communications Commission's interpretations of its accounting regulations and orders were binding upon it and could be relied upon by the public. On the basis of such an interpretation, this Court sustained the propriety of placing certain amounts in an account similar to Account 107, although it indicated that such reclassification of the amounts involved would have been unconstitutional if the regulations of the Communications Commission had been interpreted to require automatic disposition. Certainly the public, affected by the regulations and orders of the Federal Power Commission, is entitled to rely upon its interpretation of its own orders, and whether the lower court on the second review intended to reverse the position which it took on the first review or lost sight of its original holding, petitioners have been denied their right to judicial review, as argued beginning at page 31 of our supporting brief.

If we adopt the Commission's interpretation of its own order, as the court below did on the first review, then the Commission's administrative function to reverse, modify or otherwise change its order as to the disposition item, upon and after further hearings, was not exhausted until, after the rehearing, it had rendered an opinion and entered an order with respect thereto. The Commission's order of January 21, 1941, which granted a rehearing as to the matter of disposition, did not preclude the possibility that

the \$3,500,000 might be classified in another account or that it might be allowed to remain in Account 107, even though bearing the "write-up" label. This would not have violated the Commission's original cost accounting system, unless the mere reclassification of any sum in Account 107 is tantamount to an automatic write-off, without regard to asset values, in violation of the petitioners' constitutional rights. *American Tel. & Tel. Co. v. U. S.*, *supra*.

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U. S. 680, 689.

See also: *Michels v. Olmsted*, 157 U. S. 198, 201;

United States v. Chicago, Milwaukee R. Co., 282 U. S. 311, 342.

Furthermore, the right of petitioners to have this Court pass upon what patently are important constitutional questions, in spite of the Commission's maneuvering to prevent such a determination, is abundantly clear even if we accept, for purposes of argument, the current contention of the Commission that only the method of disposition was before the lower court upon the second review.

The Commission was fully informed that petitioners contended that no sum placed in Account 107 could be written off Northwestern's fundamental books of account if the value of its assets was sufficient to support its capital structure. That the Commission was abundantly aware of our position is shown by the following statement made in its order of January 21, 1941:

“That this grant of rehearing shall not be construed as acknowledgment by the Commission that the character of evidence set out in the application for a rehearing is considered relevant and material to the issue at rehearing” (R. 113).

At the time such order was entered, it thus was apparent that the Commission intended to allow the offer of testimony as to the value of Northwestern's property for the express purpose of raising the constitutional issue.

There certainly can be no question but that the Commission's present repudiation of its clear and definitive interpretation of its original order, coupled with the Circuit Court's disregard both of that interpretation and of its own adoption of that interpretation on the first review, denies the petitioners judicial review of a vital constitutional question and therefore violates the due process clause. And in all events, any consideration of a method or plan which requires the writing-off of amounts fully supported by existing asset values inherently raises the question of deprivation of property without due process.

II.

This case does not deal solely with accounting, as the Commission's brief implies. The challenged order goes beyond the scope and function of accounting, and the brief in opposition does not present grounds for denial of our petition for certiorari. The brief fails to disclose reasons why the questions presented, involving a determination for the first time by this Court of conflicts between the asserted authority of the Commission and state law or state regulation, should not be considered. The possible or probable conflicts are many and concern each of the states and involve a large part of the electric industry. The brief

in opposition does not even consider whether the Commission, instead of state authority, controls the fundamental accounts of public utilities, or the Commission's disregard of state laws, or the extent to which the Commission may exclude state authority, regulatory or judicial, or the Commission's unwarranted disregard of the existing surplus of Northwestern or its arbitrary requirement that disposition of the \$3,500,000 be made only out of future earnings.

The twice repeated quotation (Commission's brief, pp. 7 and 11) of the statement of counsel for Northwestern that "our only plan of disposition, if you want to call it that, was one of indisposition to do anything about it" is both elliptical and unfair. The statement of counsel which immediately followed that quoted by the Commission's brief was, "In other words, our plan of disposition was a plan of retention, of keeping that there, which is our position now, that that is an asset, that there are assets that we value on the asset side of the balance sheet to match the liabilities, including the three and a half million dollars that is on the other side" (R. 1080). Nor does the refusal of petitioners to suggest any form of disposition other than that of retaining the \$3,500,000 in Account 107 make applicable the criticism suggested in *Alabama Power Company vs. Federal Power Commission*, 128 F. (2d) 280, since the Alabama case involved a licensee which was under both statutory and contractual obligation to see that its accounts reflected the original cost of its licensed projects. The denial of certiorari in that case therefore involved neither an interpretation of the statute nor any constitutional question.

American Tel. & Tel. Co. v. U. S., *supra*, is likewise not authority for the statement (Commission's brief, p. 9) that the lower court's approval of the mere transfer of the \$3,500,000 in question to Account 107 determined the Commission's power to dispose of that amount arbitrarily. On

the contrary, the decision in that case indicates that to treat disposition as an inevitable consequence of reclassification to Account 107 is arbitrary and invalid. The Commission was unable to cite in the court below, and is unable to cite here, a single court decision holding that any portion of the capital accounts of a public utility (as distinguished from a licensee under the Federal Power Act) may be required to be written off or written down where they are fully supported by the value of its assets. Precisely that question was presented to the court below. It was not passed upon, either on the review of the Commission's original order or on the review of the disposition order. The petitioners clearly are entitled to have this question decided.

No argument urged either in the opinion of the court below or in the Commission's brief in opposition to our petition for certiorari has even approximately answered our contention that American Power & Light Company, as the owner of Northwestern's common stock, has suffered a taking of its property without due process. Aside from the fact that the issue of disposition was not before the lower court upon the first review, American was not a party to that proceeding and it cannot be said to have had its day in court with respect to the taking of its property rights. The Commission's brief (p. 12) baldly asserts, without citation of authority and without pertinent reference to the record, that American's purchase of Northwestern's common stock (in an arm's-length transaction involving some 490 holders of such stock; Ex. 88, R. 933-964) at a cost of \$5,021,799.33 is "irrelevant in this proceeding." Why and how is that fact irrelevant? Why was American permitted to become a party to this proceeding if not to defend that investment? Perhaps such an investment is irrelevant in the eyes of a commission which is at once prosecutor and judge and which is intent upon its own

concepts, but it is poignantly and peculiarly relevant to the stockholders of American.

It has not been urged—and, in the light of the record, could not be urged—that Northwestern's common stock is without very real and substantial value when measured by any of the orthodox yardsticks. Furthermore, the lower court's opinion recognizes that the order of the Commission will decrease the market value of such stock, "probably substantially" (R. 1240).

The Commission's order requires American to forego all dividends on Northwestern's common stock until, to use the Commission's own language, there has been obtained "from the holders of the common stock (the holding company) a consideration of \$3,500,000 for the stock", *i. e.*, until American has paid for the stock \$5,021,799.33, plus \$3,500,000, or a total of \$8,521,799.33. The effect of the order thus is to destroy or gravely impair the value of American's present investment in such common stock. And yet, in the teeth of this language from the Commission's own opinion, its brief in opposition to our petition for certiorari asserts (p. 12) that its required revamping of Northwestern's capital structure is "in no way analogous to a corporate reorganization"!

In short, the Commission's brief has not answered petitioners' contentions that this case presents important Federal questions which have not been, but should be, settled by this Court, that the decision of the lower court is in conflict with the decisions of this Court in *American Tel. & Tel. Co. v. U. S.*, *supra*, and in *Consolidated Rock Products v. Du Bois*, 312 U. S. 510, and that the lower court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is again respectfully urged that our petition for writ of certiorari should be granted.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PACIFIC POWER & LIGHT COMPANY,

and

AMERICAN POWER & LIGHT COMPANY,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REHEARING

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IN THE

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FEDERAL POWER COMMISSION,
Respondent.

No 10,386

PETITION FOR REHEARING

Petitioners respectfully pray, for the reasons hereinafter set forth, that they be granted a rehearing as to the decision entered herein on March 10, 1944. The decision affirms an order of the Federal Power Commission dated November 24, 1942. Paragraph H of said order directs Pacific "to dispose of" the amount of \$2,741,591.66 classified in Account 100.5, Electric Plan Acquisition Adjustments, by charging said amount to Account 537, Miscellaneous Amortization, in ten equal annual charges commencing with the calendar year 1942. This \$2,741,591.66 represents the excess, over so-called "original cost" of the cost to Pacific or to American, of the cost of assets acquired in arm's-length transactions with former owners, who were in no way affiliated or associated with either Pacific or American.

The Court's opinion appears to rest on the assumption that the evidence supports a finding that the amount in Pacific's Account 100.5 "represents essentially a capitalization of prospective earning power, having no continuing place in the accounts of a public utility." This assumption is grounded on opinions of the Commission's staff, opinions which we submit are not supported by anything which may be regarded as substantial evidence, particularly in view of the decisions of the Supreme Court in the cases of *Amer. Tel. & Tel. Co. v. United States*, 299 U. S. 232 (1936), and *Northwestern Electric Co. v. Federal Power Commission*, 88 L. ed. 394 (Adv. sheets—decided January 31, 1944). Pronouncements of so-called experts which are contrary to the opinions of the highest court in the land cannot be treated as substantial evidence. The decisions in the two cases above cited do justify "writing-off" items of a *fictitious nature*, but they equally imply the impropriety of ordering a write-off of so-called "intangibles" of the nature of those present in Pacific's 100.5 Account.

We respectfully submit, not only that the opinions of the Commission's staff failed to take into account the nature and enduring quality of the so-called "intangibles" here involved, but also that this Court has been misled into holding that such opinions constituted substantial evidence by erroneously construing the decisions in the two Supreme Court cases above cited as permitting the Commission to order the writing-off of "intangibles", regardless of whether they represent fictitious or real values. A careful analysis of these Supreme Court opinions will demonstrate, we believe, that they do not sanction an ordered writing off of the so-called intangibles involved in

this case. The reasons why such "intangibles" may not be so required to be written-off have been presented in Petitioners' argument and briefs. These points will not be reargued here, but some reference to such reasons is necessary to demonstrate the illegality and unconstitutionality of the order under consideration, under any reasonable interpretation of the Supreme Court's opinions.

ORIGIN AND NATURE OF SO-CALLED INTANGIBLES

As pointed out on pages 6 to 9 of Petitioners' opening brief herein, American and Pacific acquired at various times, in arm's length transactions, beginning early in 1910, a large number of operating utility properties as going concerns. These were purchased with the object of combining the properties, and their then developed business and trained personnel and recognized strategic locations, into an integrated public utility system, and of thereby rendering better service and at lower cost to existing and future customers in areas served. Also, as pointed out in Petitioners' opening brief on pages 20-22, these local utility properties, by reason of the pioneering and development of business by their then and former owners, and of their favorable locations, had a value very much greater than their recorded original cost. If such increases in value, which came about as a natural consequence of the efforts, foresight, and sacrifices of the former owners, plus improvements in the art of production and distribution of electric power, and the relation of the several projects to each other as potential parts of a large and unified system, are "intangibles" which "tend to disappear" and should therefore be written-off the books, then a large part of the value inherent in San Francisco business real

estate or in any successfully pioneered business, should likewise be written-off the books of the current owner who purchased the property from the pioneer or his successor.

The fact is that any true increment of value of every property or business which, in an arm's length transaction, will bring a price in excess of the original cost of the physical assets, by reason of technological improvements, strategic location, or other valuable characteristics inherent in the physical assets, would be subject to classification on the Commission's theory as an "intangible" which tends to disappear. The value of gold might disappear if it ceased to be a unit of monetary value, but no one would have the temerity to argue that the difference between the cost of a plot of land before gold was discovered thereon, and its sale price after the discovery of gold, was an intangible which must be written-off. The so-called intangible values purchased and paid for by Pacific are even more permanent and less speculative, since they were rooted in and inseparable from the projects and businesses purchased, and are now important elements of Pacific's integrated electric utility system; and the life of these values is not restricted by the wearing out of individual poles or meters, but is continuous throughout the life of the system in which these values are imbedded. These so-called intangible values, fixed in arm's length transactions, combined with the original costs of physical assets, represented at the time of purchase the true value of the properties and business acquired by Pacific. Although individual items of the physical property originally purchased may disappear, in the sense of being replaced by other items of similar or different character, the intangible values inher-

ent in each of the individual properties purchased will continue as an integral part thereof, so long as the communities which they serve continue to exist and to use electric service.

Even if such intangible values should be rooted in or associated with prospective earning power, their status in that respect is no less entitled to continued recognition, so long as the values survive, than any other true element of value at its purchased cost. As we shall demonstrate, the Supreme Court of the United States, however, has refused to apply, even to public utilities, the drastic doctrine that true increments of value, regardless of the causes or circumstances responsible for them, must be written off.

It is suggested by this Court in its opinion that the physical properties with which these intangibles were associated have not been shown to be in existence today; but any such suggestion misconceives the nature of Pacific's investment in these intangibles, and confuses the individual pieces of wire, poles or other equipment with the organized unit of which the individual physical items are merely easily replaceable parts. That the so-called intangible values purchased by Pacific are all in existence today, and are actually more valuable than ever, is fully demonstrated by a casual reading of Exhibit 15, pp. 1-115 (R. 119-130, 143).

True and lasting increments of value, appraised and purchased in arm's length transactions, as distinguished from fictitious increases, are not the kind of intangibles that can be legally and constitutionally ordered written off the books, as a careful analysis of the opinions in *Am. Tel. and Tel. Co. v. United States* (supra) and *Northwestern Electric Co. v. F. P. C.* (supra), will show.

ARGUMENT

This Court points out that Mr. Justice Cardozo, at page 242 in the Telephone case, intimated that the acquisition cost in excess of original cost could properly be disposed of after the character of the item had been determined. This Court, however, overlooked his equally strong statements that "only such amount will be written-off" from telephone Account 100.4, "as appears . . . to be a fictitious or a paper increment", and that amounts which represent "an *investment* which the accounting Company has made in assets of continuing value will be retained in that Account until such assets cease to exist or are retired." Although these broad characterizations of the type of incremental value which should remain in telephone Account 100.4 are not defined in detail by Justice Cardozo, (probably because he was merely concerned at this point with explaining that the definition of said Account 100.4 did not necessarily make the classification of items in that account arbitrary) Justice Cardozo's discussion makes it perfectly clear that any amount paid for a property or business in excess of original cost, fixed in an arm's length transaction and not excessive in amount, could not be "*withdrawn from recognition as a legitimate investment.*"

In discussing the objective of the telephone accounting system, at 299 U. S., page 239, Justice Cardozo referred to the fact that transactions giving rise to the items required to be classified in telephone Account 100.4 are often between affiliated companies, and that buyer and seller in such circumstances may not be dealing at arm's length, or the price agreed upon between them may be a poor criterion of value; and that, even in transactions be-

tween rival systems, there is the possibility that nuisance value rather than "market or intrinsic value for the uses of the business" fixed the price. It is for these reasons that spreading the cost figures on the record may facilitate the work of the regulatory commission. Here is a clear recognition that all amounts properly placed in telephone Account 100.4, the equivalent for present purposes of Pacific's Account 100.5, represent an increase or decrease over the original cost of a business when first dedicated to the public use, plus all proper outlays and deductions up to the date of purchase; and that, to the extent any such amount represents an increase fixed in a bonafide transaction, it represents a true increment in value at the time of purchase and must be retained in Account 100.4 while such value continues. According to the Federal Power Commission, however, such an increment is an intangible which must be written off, regardless of the fact that it represents a true increment of value at the date of purchase, and was fixed in an arm's length transaction not subject to attack as imprudent from the purchaser's standpoint, and of the further fact that such increment of value continues to inhere in the property so purchased.

Mr. Justice Cardozo does not accept that point of view. He says, at 299 U. S. 240, that if such items must be arbitrarily written off as contended, there would be force in the contention that "the effect of the orders is to distort in an arbitrary fashion the value of the assets"; and he further states, on page 240, in answer to any such proposal:

“The Commission is not under a duty to write off the whole or any part of the balance in 100.4, if the difference between original and present cost is a true increment of value. On the contrary, only such amount will be written off as appears, upon an application for appropriate directions, to be a fictitious or paper increment. This is made clear, if it might otherwise be doubtful, by administrative construction.”

Not content, however, to submit the question on the basis of his own definition of the account and explanation of its operation, he requested the Commission to reduce to writing an interpretation of the account as follows: (p. 241)

“that amounts included in Account 100.4 that are deemed, after a fair consideration of all the circumstances, to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired; and, in accordance with paragraph (C) of account 100.4, provision will be made for their amortization.”

Then, to make doubly sure that such true increments in value would be retained on the books, he recited that this construction would be binding upon the Commission, and he took pains to distinguish the case of *New York Edison Co. v. Malbête* (244 App. Div., 685; 271 N. Y. 103) which condemned a similar account as unconstitutional, because it had required the account to

be written off in its entirety out of surplus, whether the value there recorded was *genuine or false*.

And then, by way of summary, and seemingly as an admonition to the Commission, he emphasized the necessity of recognizing as *legitimate investments* incremental values properly fixed, as follows:

“The administrative construction now affixed to the contested order devitalizes the objection that the difference between present value and original cost is withdrawn from recognition as a legitimate investment.”

This sentence makes perfectly clear that any difference between “original cost” and the true value at the date of purchase is a *legitimate investment*, which must be permitted to remain on the books of the purchasing company as an investment so long as such incremental value exists.

Mr. Justice Roberts, speaking for the present Supreme Court in the case of *Northwestern Electric Co. v. Federal Power Commission* (supra), seemed equally impressed with the necessity of recognizing such true incremental values as legitimate investments, when he said:

“Although if American had purchased the assets of Northwestern it might have been allowed to place among its assets on its own books the actual cost to it of the physical property of Northwestern, the fact is irrelevant upon the question whether Northwestern may carry a fictitious asset account representing estimated value of capital stock issued neither for money nor for property at exchange value.”

Here again, although the Supreme Court recognizes the right of the Commission to establish a system of accounts classifying the assets, it clearly appears that the Commission's power to order a write-off of book value must rest upon a determination that such "values" were and are fictitious. Northwestern was not allowed to maintain a "fictitious asset account representing estimated value of capital stock issued neither for money nor for property at exchange value"; but, if American had purchased the assets of Northwestern instead of its stock, the cost to it (American) could have been carried on American's books as an asset. In other words, the write-off was approved because the amount was fictitious and not a true increment of value so far as Northwestern was concerned, and *not because* incremental values are intangibles which tend to disappear or have no place in the accounts of an electric public utility.

There is no doubt that the Federal Power Commission, on the authority of the Supreme Court cases above cited, may classify the difference between original cost and acquisition cost in Account 100.5, and that the Commission may examine and take evidence to determine whether or not this difference represents a true increment in value; but the Commission may not order this difference written off unless substantial evidence, after opportunity to present all relevant evidence on the subject is permitted, demonstrates that the difference constitutes a fictitious or paper increment, or no longer exists as value.

In the instant case there is not a scintilla of evidence that the difference between "original cost" and acquisition cost represents a fictitious or paper increment, or that it was fixed by a fraudulent transaction or even by an improvident or careless negotiation. On the contrary, it was

conceded on the argument, and this Court in effect finds, that all the transactions involving sums placed in Account 100.5 were arm's length transactions, that the payments were bona fide, and that Pacific's investments therein were prudent.

In such circumstances, it is our sincere conviction that this Court will desire a re-argument of this case, if there is a reasonable ground for our belief that the above analysis represents the law as declared by the Supreme Court. We are equally sincere in our conviction that this Court fell into error,

first, by assuming, because the Supreme Court has upheld the right of the Commission to adopt and enforce its system of accounts, that the Supreme Court has also sanctioned the Commission's asserted power to order the write-off of all intangibles, regardless of whether or not they represent true incremental values; and

second, by assuming, because Mr. Justice Roberts in the Northwestern case declined, unless the plan adopted by the Commission were "obviously arbitrary", to "determine what is the better practice" of disposing of a fictitious write-up, that the Supreme Court placed the opinion testimony of the Commission's staff members above court scrutiny, even when such opinions relate to fundamental property rights with respect to which the highest Court in the land has already expressed a controlling opinion.

The first point has been fully explored above. As to the second point, it seems obvious that opinion testimony,

even if it should represent the views of an unbiased expert, lacks every element necessary to qualify such opinion as evidence, not to mention *substantial evidence*, if it is not based on and supported by fundamental facts, or if it clashes head-on with a determination of the law by the highest court in the land. In such case, the accountant (biased or unbiased) thus convinced against his will, of course may retain the same opinion still, but the opinion can have no evidentiary value. We believe we have shown that there are no facts in this case which would justify substituting any accountant's opinion, on what is fundamentally a matter of law and constitutional rights, for the determination of the Supreme Court dealing directly with the subject matter.

Indeed, the record is devoid of any factual evidence to support the opinion of the Commission's staff. There is no evidence that the incremental values recorded in Pacific's Account 100.5 came into being by reason of imprudent or improper motives or dealings, or that such values are now, or were when the purchases occurred, fictitious or paper increments. There are no fundamental facts in the record upon which an expert could or would be justified in stating that these particular so-called intangibles tend to disappear, particularly since the Commission's staff admits that there is no necessary relationship between the life of tangibles and intangibles. R 505.) There are no facts in the record showing that such values have disappeared or that they will disappear. There is the mere enunciation by the Commission's staff members of a general theory that "intangibles tend to disappear", followed by their opinion that intangibles have no place in the accounts of an electric public utility, and that the so-called intangibles here involved should therefore be written off.

The so-called evidence upon which the Court relied for the decision in this case thus is merely a statement of the predilections of the Commission's staff members as opposed, in our view of the case, to decisions of the Supreme Court of the United States on what is fundamentally a legal question. Such predilections are not substantial evidence or any evidence, to say nothing of their incompetence as evidence when unsupported by any facts applicable to the particular case and the circumstances here involved. The glaring deficiency in such opinion testimony as evidence is again apparent from the admission of the Commission's staff that its accountants have no function in determining what shall be done with balances placed in Account 100.5—it being a function of management and the Commission. (R. 501-503.) Petitioners objected to all the testimony offered by the staff members relating to this subject, on the ground that they were not qualified to express opinions on the matter. (R. 487-488, 518.)

This Court apparently justified the exclusion of our offer of fair value testimony on the ground that this is not a rate proceeding. That this is not a rate proceeding is conceded, but in thus disposing of the question, the Court seems to have lost sight of the fact that one of the principal reasons advanced by the Commission's staff, in support of its theory that incremental values have no place in utility accounts, is the staff's own *say-so* that such values may have no value whatever for the purpose of rate making or for security purposes" (Record, 533). Cost, however, is one of the elements which must be considered and weighed in arriving at a rate base, and to the extent that evidence of the present value of the Company's assets throws lights upon the continued existence of the pur-

chased incremental values (labeled intangibles in this instance by the Commission) which were and are properly recorded in Account 100.5 in accord with decisions of Mr. Justice Cardozo and Mr. Justice Roberts, such testimony was relevant, material, and competent with respect to the issues involved.

If such testimony had been admitted, it would have established beyond doubt that such so-called intangibles not only represented true increments of value at the time of purchase, as distinguished from fictitious or paper increments, but also now represent values greatly in excess of the incremental values presently recorded in Account 100.5. The exclusion of this testimony, therefore, was error, and constituted a denial of due process which requires the reversal of the Commission's order of November 24, 1942. This conclusion is inevitable, even if we entirely ignore the unfair and arbitrary ruling permitting the Commission's staff members to support their opinion testimony on rate making principles, while denying the Petitioners the right to introduce factual testimony to rebut such opinions, as discussed on pages 12 and 13 of Petitioners' Reply Brief.

In the case of *Baltimore & O. R. Co. v. United States*, 5 F. Supp. 929, dealing with the duty of an administrative agency to take and weigh evidence, the court said at page 931: "*To refuse to consider pertinent evidence introduced is arbitrary action.*" (Emphasis supplied.) It necessarily follows that refusal to admit pertinent evidence is equally arbitrary action and denial of due process. See also: *National Labor Relations Board v. Union Pacific Stages*, 99 F. 2d (C.C.A., Ninth Circuit) 153, 177. *Chicago Junction Case*, 264 U. S. 258, 265.

There is perhaps only one further point which requires additional discussion. The Petitioners contended, both in their application for rehearing (Record, 68-69, 76-77); and in their petition for review (Record 102-105), that any required disposition of the whole or any part of the amounts recorded in Account 100.5 by amortization or otherwise would constitute a taking of property without due process. The Court, nevertheless, appears to acquiesce in the novel theory advanced by the Commission that Petitioners, in objecting on constitutional grounds to any disposition in whatever nature or manner, through Account 537 or otherwise, must actually go farther; that Petitioners must assume that their objection will be overruled; and that they must affirmatively suggest in advance the use of an account which might make the ordered write-off under attack less burdensome though still objectionable. This is tantamount to requiring the Petitioners to discredit in advance their own objection. If adhered to as a basis of decision, the Court is plainly in error. (See Petitioners' Reply Brief, pages 11-12.)

Since the impropriety of presently requiring any disposition of the sums recorded in Pacific's Account 100.5 seems obvious on the present record, any discussion of the point beyond reference to pages 26-31 of Petitioners' Brief and pages 11-12 of Petitioners' Reply Brief is perhaps unnecessary. However, since the subject will undoubtedly be the subject of argument on rehearing, we respectfully point out that any amortization through an account which has the result of releasing the consumer from his admitted obligation to pay for the use of Pacific's assets is a taking of Petitioners' property without due

process. Such would be the effect of requiring disposition through charges to Account 537.

In view of the great importance of the issues here involved, and of the public interest therein, we trust that this Court will find that further oral argument and written briefs are necessary for the proper consideration of Petitioners' contentions herein.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Petitioners' briefs, it is respectfully urged that a rehearing be granted herein before all the Circuit Judges of the Ninth Circuit (See: *Textile Mills Sec. Corp. v. Com. of Int. Rev.*, 314 U. S. 326; *Pacific Gas and Electric Company v. Securities and Exchange Commission*, 127 F. 2d. 378), and that the mandate of this Court be stayed pending the disposition of this petition.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, JOHN A. LAING, an attorney for the Petitioner Pacific Power & Light Company, do hereby certify that in my opinion the foregoing Petition for Rehearing in the case of Pacific Power & Light Company and American Power & Light Company, Petitioners, v. Federal Power Commission, Respondent, No. 10386, is well founded and that it is not interposed for delay.

JOHN A. LAING.

Dated: March 27, 1944.

